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No.

In the Supreme Court of the United States

STATE OF SOUTH DAKOTA,

Petitioner,

v.

SDDS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

In this case, a federal court issued an injunction to prevent the State of South Dakota from defending itself against certain claims in a takings action for money damages brought against the State in its own state courts. The State then moved, pursuant to Fed. R. Civ. P. 60(b)(4), to vacate the federal court's injunction and a prior judgment in the same case as void because the State had never consented to suit in federal court, and because state law barred state officials from waiving Eleventh Amendment immunity from suit in federal court. This motion was denied and the denial was affirmed by the court of appeals, which held that the State had waived its Eleventh Amendment immunity by litigating the case on the merits. The questions presented are:

1. Whether a State should be deemed to have waived its Eleventh Amendment immunity by litigating the merits of the claim against it in federal court, even when state law prohibits state officials from waiving that immunity.

2. Whether a party is barred from seeking relief from a void judgment under Rule 60(b)(4) because the party did not seek to challenge that judgment by petitioning for a writ of certiorari in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit (App., *infra*, 1a-6a) is reported at 225 F.3d 970. The order of the United States District Court for the District of South Dakota (App., *infra*, 7a-8a) is unreported.

JURISDICTION

The decision of the Court of Appeals for the Eighth Circuit was filed on September 15, 2000, and a timely petition for rehearing was denied on November 9, 2000. App., *infra*, 50a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. AMEND. XI.

Federal Rule of Civil Procedure 60(b) provides in relevant part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: * * * (4) the judgment is void." Fed. R. Civ. P. 60(b)(4).

STATEMENT

The decision below is the last in a series of Eighth Circuit holdings in this litigation that have worked an extraordinary departure from the principles of the Eleventh Amendment. In its prior decisions at earlier stages of this proceeding, the court of appeals entertained an action brought *directly* against the State of South Dakota in its own name and then enjoined the State and state officials not to defend South Dakota against claims for money damages advanced in the State's own courts, effectively directing the entry of judgment against the State in a suit for retroactive monetary relief. In the decision below, the court held that those earlier judgments could not be set aside as void under the Eleventh Amendment because the State had surrendered its Eleventh Amendment immunity simply by litigating the merits of the claims against it – notwithstanding a South Dakota statute that expressly prohibits state officials from waiving the State's immunity. The Eighth Circuit also held that a party may not seek to set aside a judgment as void under Fed. R. Civ. P. 60(b)(4) unless it first not only takes an appeal from the challenged judgment, but also seeks review of that judgment by writ of certiorari in this Court. Both aspects of that holding are inconsistent with this Court's decisions and irreconcilable with the rulings of other courts of appeals. Because the decision below made those errors in a setting that "implicates the fundamental constitutional balance between the Federal Government and the States" (*Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238 (1985)), review by this Court is imperative.

1. The procedural history of this case is long and complex, but the relevant developments are (relatively) simply stated. In 1991, the citizens of South Dakota enacted a ballot referendum that South Dakota Disposal Systems, Inc. ("SDDS"), respondent in this Court, alleged prevented it from operating a waste disposal facility in that State. SDDS responded by

bringing an action in federal court seeking declaratory and injunctive relief against both the State of South Dakota itself and various state officials, arguing that the referendum violated the Commerce Clause of the U.S. Constitution. The Eighth Circuit agreed with respondent's claim, holding the referendum unconstitutional. *SDDS, Inc.* v. *State*, 47 F.3d 263, 268 (8th Cir. 1995) ("*SDDS VI*") (App., *infra*, 32a-49a).[1]

At the same time that SDDS pursued relief in federal court, it also commenced a temporary takings action against the State in South Dakota state court, seeking millions of dollars for losses allegedly resulting from the referendum. See *SDDS, Inc.* v. *State*, 569 N.W.2d 289, 290 (S.D. 1997) ("*SDDS* v. *State*"). SDDS alleged that the taking ran from July 1, 1991, the date approval of the facility allegedly would have gone into effect absent the referendum, to February 6, 1995, the date on which the Eighth Circuit held the referendum unconstitutional. The trial court granted summary judgment to the State on this claim because SDDS was not entitled to site, construct or operate a waste disposal facility without a valid permit; because SDDS never held a valid permit; and because SDDS failed to demonstrate that the referendum was the cause of the facility's failure. See *ibid.* SDDS appealed that decision to the South Dakota Supreme Court.

While that state-court appeal was pending, SDDS also sought an injunction from the *federal court* that would bar the State and state officials from defending the ruling of the state trial court in the state-court litigation. The district court denied injunctive relief, but the Eighth Circuit reversed. *In re SDDS, Inc.*, 97 F.3d 1030 (9th Cir. 1996) ("*SDDS VIII*") (App., *infra*, 9a-31a). The court of appeals began by holding that the Eleventh Amendment did not deprive it of jurisdiction,

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[1] We cite to the Eighth Circuit's prior decisions as *SDDS VI* and *SDDS VIII* to conform to the citation style used in the decision below.

reasoning that – although the State was named as a party – the court could entertain the suit because the action sought "only to effectuate our earlier judgment" in *SDDS VI*. 97 F.3d at 1033-1036 & n.7 (App., *infra*, 10a-18a & n.7). The court of appeals reached this conclusion even though there no longer was any continuing violation of federal law because the referendum had long ago been declared unconstitutional and SDDS had abandoned its plans to construct a waste disposal facility; respondent's sole purpose in seeking the *SDDS VIII* injunction was to direct the outcome of litigation against the State seeking *retroactive* money damages for a *past* (and already terminated) temporary taking. Turning to the merits, the Eighth Circuit, relying on two rather opaque footnotes in its prior Commerce Clause opinion, went on to determine that *SDDS VI* had in fact resolved in SDDS's favor two of the principal issues in the pending state takings suit. See 97 F.3d at 1037-1040 (App., *infra*, 20a-28a). The Eighth Circuit accordingly directed the district court to enjoin "the Defendants from relitigating in the South Dakota state courts the issues of (1) whether [respondent] had a legitimate claim of entitlement to a permit to operate a [waste disposal facility], and (2) whether the referendum was the proximate cause of [respondent's] dissolution." *Id.* at 1042 (App., *infra*, 31a).

Armed with the federal injunction, SDDS then prevented the State from presenting argument to the South Dakota Supreme Court in the state takings case, threatening the State with federal contempt proceedings and demanding that the State withdraw the brief it had submitted to that court. Under threat of federal contempt proceedings, the State declined to file a supplemental brief requested by the South Dakota Supreme Court or to present any oral argument regarding the impact of the federal injunction upon the state takings action. The South Dakota Supreme Court therefore considered the takings case without hearing argument from the State.

That court proceeded to rule for SDDS on the merits of the takings claim, reversing the trial court's grant of summary judgment for the State and remanding the case for a calculation of respondent's damages. *SDDS* v. *State*, *supra*. The South Dakota Supreme Court explicitly stated that it believed itself bound to rule for SDDS by the Eighth Circuit's decision, declaring that, had it been able to reach the merits of the takings claim, the "analysis of [its] own case law may have produced a different result." 569 N.W.2d at 293 & n.9. The South Dakota Supreme Court thus noted that, under South Dakota law, SDDS did not have a vested property interest that would be compensable in a takings suit. *Id.* at 293 n.9. As a consequence, but for the federal injunction, the South Dakota Supreme Court likely would have affirmed the grant of summary judgment to the State in the takings action. The State unsuccessfully petitioned this Court for a writ of certiorari to review the South Dakota Supreme Court's decision. *South Dakota* v. *SDDS, Inc.*, 523 U.S. 118 (1998)).[2]

Upon remand of the taking action, the South Dakota trial court entered a judgment in excess of $10 million against the State. That judgment subsequently was vacated by an order for a new trial, which is itself currently on appeal to the South Dakota Supreme Court.

2. Shortly after the South Dakota Supreme Court's decision, the State and various state officials moved the federal district court under Fed. R. Civ. P. 60(b)(4) to set aside as void the federal judgments resulting from the decisions in *SDDS VI*

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[2] SDDS resisted that petition by arguing, among other things, that the state court judgment was not a final ruling within the meaning of 28 U.S.C. § 1257. That argument, of course, has no bearing on this petition. In addition, SDDS argued that the State was indirectly attacking the federal court ruling, a contention that also is no longer relevant in this phase of the case.

and *SDDS VIII* – that is, the judgments that the South Dakota Supreme Court regarded as dictating a ruling in SDDS's favor in the takings claim. The state movants argued that the Eleventh Amendment precluded federal courts from asserting jurisdiction directly over the State of South Dakota or from issuing injunctive relief that effectively imposed monetary liability on the State. The district court denied the motion. App., *infra*, 7a-8a.

The court of appeals affirmed, on two related grounds. App., *infra*, 1a-6a. First, the court held that the State was not entitled to Rule 60(b)(4) relief because it

> did not seek review, by petition for writ of certiorari, of either *SDDS VI* or *SDDS VIII* and instead has attempted to collaterally attack those final decisions by way of a Rule 60(b) motion in the district court. Just as a rule 60(b) motion cannot be used to relitigate the merits of a district court's prior judgment in lieu of a timely appeal, not can it be used to collaterally attack a final court of appeals' ruling in lieu of a proper petition for certiorari in the United States Supreme Court.

Id. at 4a.

Second, the Eighth Circuit held that the State had waived its Eleventh Amendment immunity by defending the *SDDS VI* and *SDDS VIII* suits on the merits in federal court. The court of appeals was of the view that "'[a] state may * * * waive its Eleventh Amendment immunity through its conduct. Courts have inferred a waiver when the State has made a general appearance in federal court and defended a lawsuit on the merits.'" App., *infra*, 4a (quoting *Hankins* v. *Finnel*, 964 F.2d 853, 856 (8th Cir. 1992)). From that starting point, the court held:

> In the present case, the State for many years actively and vigorously litigated the merits of SDDS's claims in federal court, never once raising an Eleventh Amendment immunity defense until after the mandates had been issued and our decisions in *SDDS VI* and *SDDS VIII* were final. In light of the State's conduct, it would appear that the State has waived any sovereign immunity defense it may have had to the claims addressed in *SDDS VI* and *SDDS VIII*.

Id. at 4a-5a.[3]

REASONS FOR GRANTING THE PETITION

Although the Eighth Circuit's decision is brief, the court committed significant errors of law that will undermine fundamental Eleventh Amendment doctrine, detract from "the dignity and respect afforded a State, which the [Eleventh Amendment] immunity is designed to protect" (*Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997)), and create uncertainty in areas of great practical importance. The court of appeals' conclusion that a State's conduct of litigation will effect a waiver of Eleventh Amendment immunity means that

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[3] Although it should be irrelevant to Eleventh Amendment analysis whether the State raised its immunity at some earlier point in the litigation, and the whether the State did so therefore does not bear on the proper answer to the questions presented in the petition, it is worth noting that the State in fact *did* raise its Eleventh Amendment immunity in *SDDS VIII*. The court of appeals could hardly have been unaware of that: the court itself addressed the State's Eleventh Amendment arguments at some length in its opinion in that case. See 97 F.3d at 1033-1036 & n.7 (App., *infra*, 15a-19a & n.7). The State also raised the Eleventh Amendment in its answer to the *SDDS* complaint, advancing as an affirmative defense "that Plaintiff's claim fails on the doctrine of sovereign immunity and, to the extent that it can be construed to involve a claim for monetary relief, is barred by the Eleventh Amendment to the United States Constitution." Answer at 17, ¶ 24.

States will be held liable in federal court even when they did not voluntarily submit themselves to federal-court jurisdiction. And the Eighth Circuit's analysis of Rule 60(b)(4) would, among other things, make the filing of a petition for certiorari in *this Court* (whether or not the case is certworthy) a prerequisite for obtaining relief from a void judgment under Fed. R. Civ. P. 60(b). Not surprisingly, both aspects of this decision are insupportable and inconsistent with the holdings of other courts of appeals.

A. The Eighth Circuit's Holding That A State Waives Its Eleventh Immunity By Engaging In Litigation Is Inconsistent With Decisions Of This Court And Of Other Courts Of Appeals

In holding that its prior judgment should not be vacated as void for lack of jurisdiction, the court of appeals reasoned that South Dakota should be deemed to have waived its Eleventh Amendment immunity because the State had "for many years actively and vigorously litigated the merits of [respondent's] claims in federal court." App., *infra*, 6a. This holding, however, plainly cannot be reconciled either with decisions of this Court or with the rulings of other courts of appeals. The Eighth Circuit's decision also contributes to continuing confusion in the lower courts about the scope of Eleventh Amendment doctrine. And it opens the door to a kind of "'end run'" around the fundamental requirement that state consent to federal-court jurisdiction be truly voluntary. *Green* v. *Mansour*, 474 U.S. 64, 73 (1985). For these reasons, review of the decision below is warranted.

1. The court of appeals surely was correct in noting that States are free to waive their Eleventh Amendment immunity. See, *e.g.*, *Coeur d'Alene Tribe*, 521 U.S. at 267. But that court was just as plainly incorrect in holding that a State's "conduct" in litigating a case on the merits may be deemed to effect such

a waiver. App., *infra*, 6a-7a. This Court has held consistently and repeatedly that "[t]he fact that the State appeared and offered defenses on the merits does *not* foreclose consideration of the Eleventh Amendment issue; 'the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar' *that it may be raised at any point of the proceedings.*" *Florida Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.18 (1982) (plurality opinion) (quoting *Edelman* v. *Jordan*, 415 U.S. 651, 678 (1974)) (emphasis added). See *Calderon* v. *Ashmus*, 523 U.S. 740, 745 n.2 (1998) ("the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power, and therefore can be raised at any stage of the proceedings"); *Alabama* v. *Pugh*, 438 U.S. 781, 782 n.1 (1978) ("'the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court'") (quoting *Edelman*); *Sosna* v. *Iowa*, 419 U.S. 393, 396 n.2 (1975) ("[T]he failure of the State to raise the defense of sovereign immunity in the District Court would not have barred [the State] from raising that issue in this Court"). See also *Wisconsin Dep't of Corrections* v. *Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring) ("The Court has said that the Eleventh Amendment bar may be asserted for the first time on appeal, so a State which is sued in federal court does not waive the Eleventh Amendment simply by appearing and defending on the merits.").

The Court's leading decision on this point is *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945), which applied the controlling principle in circumstances virtually identical to those here. In *Ford Motor*, attorneys for Indiana "appeared in the federal District Court and the Circuit Court of Appeals and defended the suit on the merits," failing to raise the Eleventh Amendment until the case reached this Court. *Id.* at 466-467. The Court nevertheless held that

> [t]his was in time [to raise the defense], however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court.

Id. at 467.

Of particular relevance here, the Court went on to note that "[i]t is conceded by the [State] that if it is within the power of the administrative and executive officers of [the State] to waive the state's immunity, they have done so in this proceeding. *The issue thus becomes one of their power under state law to do so.*" *Ibid.* (emphasis added). The Court accordingly held that it is necessary in such circumstances to examine the State's constitutional and statutory law to determine whether the State's attorneys were authorized to waive the State's Eleventh Amendment immunity in the course of litigation. Finding nothing in state law that conferred such power on state officials – notwithstanding the vigorous defense on the merits offered by the State's attorneys in the trial and appellate courts – the Court concluded in *Ford Motor* that "no properly authorized executive or administrative officer of the state has waived the state's immunity to suit in the federal courts." *Id.* at 469. The Court therefore ordered the case dismissed "for want of consent by the state to this suit." *Id.* at 470.[4]

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[4] The Court took the same approach in *Sosna* v. *Iowa*, 419 U.S. 393 (1975). In that case, Iowa advanced the Eleventh Amendment in the answer to the complaint, but then "abandoned" the Eleventh Amendment defense and did not advance it when the case reached this Court. *Id.* at 396 n.2. The Court nevertheless found it necessary to itself examine state law to determine "the circumstances under which Iowa law permits waiver of the defense of sovereign immunity by attorneys representing the State." *Ibid.*

The decision below cannot be reconciled with the rule applied by *Ford Motor* and restated in the Court's subsequent Eleventh Amendment decisions. *Ford Motor* establishes that, at a minimum, a federal court may not deem a State's participation in federal-court litigation to abrogate the State's immunity unless the court first determines that such a waiver is expressly contemplated by state law.[5] Here, however, the Eighth Circuit declined to make *any* inquiry into whether South Dakota law authorized waiver of the State's Eleventh Amendment immunity, finding instead that "the State's conduct" was sufficient to "waive[] any sovereign immunity defense it may have had." App., *infra*, 4a-5a. Yet had the court of appeals asked the question required by *Ford Motor*, it would have found that, far from authorizing the waiver of its immunity, South Dakota law expressly *prohibits* state officials from making such a waiver: "No waiver of state immunity by statute or, where permitted, by any officer or agent of the state may constitute or be interpreted as a waiver of the state's immunity from lawsuits in federal court." S.D. CODIFIED LAWS § 3-21-10 (Michie 2000).[6] Indeed, the South Dakota statute is,

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[5] In fact, a State may withdraw its consent to suit even *after* an action has been initiated. See *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527, 529 (1857). There is some authority for the proposition that immunity is waived when "a State under no compulsion to appear in federal court voluntarily invokes its jurisdiction." *Schacht*, 524 U.S. at 395 (Kennedy, J., concurring). But see *id.* at 392 ((opinion of the Court) ("A State's proper assertion of an Eleventh Amendment bar after removal means that the federal court cannot hear the barred claim"). Even if that rule is correct, however, it has no bearing here: South Dakota did nothing to invoke the jurisdiction of the federal courts.

[6] The court of appeals' disregard of this statute was not an oversight: the South Dakota law was expressly called to the court's attention in the State's reply brief, see *In re SDDS, Inc.*, Nos. 98-3588, 99-1034,

if anything, more unambiguous on this point than the law that the Court in *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 103 n.12 (1984), read as stating "an express preservation of [the State's] immunity from suit in federal court." See also *Ford Motor*, 323 U.S. at 467-468. The Eighth Circuit's error thus had – and, if repeated by other courts, often will have – very significant practical consequences.

Perhaps more fundamentally, that error also threatens values that are central to principles underlying the Eleventh Amendment. "'That a State may not be sued without its consent is a fundamental rule of jurisprudence'" stemming "from recognition of the vital role of the doctrine of sovereign immunity in our federal system." *Pennhurst*, 465 U.S. at 98, 99 (quoting *Ex parte New York*, 256 U.S. 490, 497 (1921)). The Court has effectuated this understanding by requiring "an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." *Atascadero*, 473 U.S. at 238 n.1. As a consequence, the Court has insisted repeatedly, in a wide range of contexts, that the "'test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.'" *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (quoting *Atascadero*, 473 U.S. at 241). Against this background, "[t]he whole point of requiring a 'clear declaration' by the State of its waiver is to be certain that the State in fact consents to suit" and that "the State made an 'altogether voluntary' decision to waive its immunity." 527 U.S. at 680, 681 (citation omitted). The Eighth Circuit's approach, however, makes that certainty impossible – and

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99-1035 (8th Cir.), State's Reply. Br. 17-18, and at oral argument. The Eighth Circuit thus plainly was of the view that state statutory law cannot preclude waiver of immunity by conduct.

threatens to undermine the stringency of the test applied in widely disparate Eleventh Amendment settings.[7]

Indeed, the Court has recently demonstrated that the doctrine of implied waiver has no place at all in Eleventh Amendment jurisprudence. *College Sav. Bank*, 527 U.S. at 675-687. In overruling *Parden* v. *Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964), the Court held that *Parden*'s constructive-waiver approach is inconsistent with the requirement that a State's waiver of sovereign immunity be "unequivocal." *College Sav. Bank*, 527 U.S. at 680. *College Savings Bank* also recognized that "[t]he classic description of an effective waiver of a constitutional right is the 'intentional relinquishment or abandonment of a known right

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[7] The Eighth Circuit's assertion that the State did not raise the Eleventh Amendment until "after the mandates had been issued" in *SDDS VI* and *SDDS VIII* does not affect the scope of its holding or bear on the nature of the issues presented here, for several reasons. *First*, the court plainly did not mean to suggest that, under its approach, waiver occurs only when the State waits until after final judgment to raise the immunity defense; the principal authority upon which the court relied for its waiver theory was a prior Eighth Circuit decision finding waiver where the State asserted immunity during the course of the initial district court proceedings (although the Eighth Circuit in that case found that the State had affirmatively sought to take advantage of the federal litigation for its own benefit, a factor that is not present here). App., *infra*, 4a (citing *Hankins* v. *Finnel*, 964 F.2d 853 (8th Cir. 1992)). *Second*, as a matter of Eleventh Amendment principle, it makes no difference when immunity is asserted; a federal court has no jurisdiction to enter judgment against a nonconsenting State, and any judgment that it does enter is void. And *third*, as we note above (at note 3), the State in fact *did* assert its immunity prior the court of appeals' decision in *SDDS VIII*. To the extent that factor is relevant here, it was an affront to principles of state sovereignty for the court to issue a judgment against the State by blinding itself to that fact.

or privilege,'" and that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights" like state sovereign immunity. *Id.* at 682 (citations omitted). Further, the Court observed that, in the context of federal sovereign immunity, "it is well established that waivers are not implied," and "[w]e see no reason why the rule should be different with respect to state sovereign immunity." *Ibid.* Against this background, it would be a bizarre twist if this Court struck down the notion of implied waiver or constructive consent in circumscribing Congress' powers under the Eleventh Amendment, yet reserved such notions for the federal courts, the very institutions whose power the Amendment expressly limits.

2. Given this Court's doctrine, it is not surprising that the Eighth Circuit's decision cannot be reconciled with the holdings of other courts of appeals, which have faithfully applied the principles expressed in *Atascadero*, *Pennhurst*, *Edelman*, and *Ford Motor*. Various courts of appeals have ruled that States did not waive their Eleventh Amendment immunity by, among many other things: failing to raise the immunity defense in an answer, *Richardson* v. *New York State Dep't of Correctional Serv.*, 180 F.3d 426, 448-449 (2d Cir. 1999); entering into a consent decree, *Saahir* v. *Estelle*, 47 F.3d 758 (5th Cir. 1995), and *Freimanis* v. *Sea-Land Serv., Inc.*, 654 F.2d 1155, 1160 (5th Cir. 1981) (Louisiana's action in entering into consent judgment did not waive Eleventh Amendment immunity because no attorney for Louisiana had authority to waive its immunity); appearing in a suit without explicitly raising Eleventh Amendment immunity, *Mascheroni* v. *Board of Regents*, 28 F.3d 1554 (10th Cir. 1994); appearing in a federal court action and offering substantive defenses, *Estate of Ritter* v. *University of Mich.*, 851 F.2d 846 (6th Cir. 1988); and raising the Eleventh Amendment defense in an answer, but failing to pursue it at trial, *Garcia* v. *Board of Educ.*, 777 F.2d

1403 (10th Cir. 1985). See also *Linkenhoker* v. *Weinberger*, 529 F.2d 51 (4th Cir. 1975) (even though Maryland attorney general represented to court that State waived its Eleventh Amendment immunity, Maryland law denied him the authority to effect such a waiver, so attempt to waive immunity was ineffective and court lacked jurisdiction).[8]

On the other hand, notwithstanding what we believe to be the clarity of this Court's statement of the controlling principles, several courts of appeals have adopted the approach taken by the Eighth Circuit in this case, holding that a State's participation in federal-court litigation *is* sufficient to effect a waiver of Eleventh Amendment immunity. Thus the Ninth Circuit, in *Hill* v. *Blind Industries & Services*, 179 F.3d 754 (1999), amended by 201 F.3d 1186 (9th Cir. 2000), held that a state agency "consented to jurisdiction in federal court by actively litigating th[e] action on the merits, while waiting until trial to first assert Eleventh Amendment immunity." 179 F.3d at 756. The court reasoned that, "[i]f a state or state agency elects to defend on the merits in federal court, it should be held to that choice the same as any other litigant." *Id.* at 758. In reaching this conclusion, the court of appeals dismissed this Court's contrary language in *Ford Motor* as simply "creat[ing] some confusion" on this point, and the analysis in *Edelman* as "dictum." *Id.* at 761. In this regard, the Ninth Circuit elected to follow what it characterized as the rule "propose[d]" by Justice Kennedy's concurrence in *Schacht* (*id.* at 758) – without

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[8] The Circuits are even divided about whether to raise the Eleventh Amendment *sua sponte*. Compare *Atlantic Healthcare Benefits Trust* v. *Googins*, 2 F.3d 1, 4 (2d Cir. 1993); *Sindia Expedition, Inc.* v. *Wrecked & Abandoned Vessel*, 895 F.2d 116, 119 (3d Cir. 1990); *Morris* v. *Washington Metro. Area Transit Auth.*, 702 F.2d 1037, 1040 (D.C. Cir. 1983); *Whiting* v. *Jackson State Univ.*, 616 F.2d 116, 127 n.8 (5th Cir. 1980) with *Benning* v. *Board of Regents*, 928 F.2d 775, 777 n.2 (7th Cir. 1991).

acknowledging that Justice Kennedy, although expressing doubt about the propriety of the Court's current approach, also recognized the Court's repeated declaration that "a State which is sued in federal court does *not* waive the Eleventh Amendment simply by appearing and defending on the merits." *Schacht*, 524 U.S. at 393 (Kennedy, J., concurring). See also *Katz* v. *Regents of Univ. of Cal.*, 229 F.3d 831 (9th Cir. 2000) (Eleventh Amendment immunity waived when State failed to assert defense and defendant's counsel purported to waive immunity).

Other courts of appeals also have issued rulings that cannot be squared with the Eleventh Amendment principles enunciated by this Court. See, *e.g.*, *MCI Telecomm. Corp.* v. *Public Serv. Comm'n*, 210 F.3d 929 (10th Cir.) (immunity waived when State voluntarily engaged in pre-litigation arbitration), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000); *Genentech, Inc.* v. *Regents of Univ. of Cal.*, 143 F.3d 1446 (Fed. Cir. 1998) (Eleventh Amendment immunity waived when State voluntarily created controversy resolvable only in federal court), cert. granted, judgment vacated by 527 U.S. 1031 (1999). Review of the issue presented here is necessary to resolve this disagreement.

3. It should be added that the need for review is particularly acute here because the judgments that are the subject of the State's Rule 60(b)(4) motion in fact involved especially egregious violations of the Eleventh Amendment – and because the decision below is the latest in a series of Eighth Circuit rulings in this litigation that demonstrate a cavalier disregard for the Amendment's dictates. Although the question whether the court below had jurisdiction to entertain respondent's actions against the State in the first instance was not expressly decided by the Eighth Circuit in its most recent decision, it bears emphasis that the Eleventh Amendment quite plainly made that exercise of jurisdiction improper. This means

that, absent the court of appeals' erroneous finding of waiver, the State would be entitled to relief in this proceeding.

a. At the outset, the actions in both *SDDS VI* and *SDDS VIII* unquestionably were barred by the Eleventh Amendment insofar as they proceeded against the State of South Dakota *itself*. The Eighth Circuit apparently believed that the State could be subjected to suit in its own name because SDDS was seeking "prospective injunctive relief." *SDDS VIII*, 97 F.3d at 1035 (App., *infra*, 16a). But that conclusion was plainly wrong. The Court has held repeatedly that, "when the State itself is named as the defendant, a suit * * * is barred [by the Eleventh Amendment] regardless of whether it seeks damages or injunctive relief." *Pennhurst*, 465 U.S. at 101-102. There is no ambiguity regarding the scope of the immunity provided to States, *qua* States, by the Amendment: the Court has "often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 58 (1996) (citing *Cory* v. *White*, 457 U.S. 85, 90 (1982)) ("It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought."). "The Eleventh Amendment does not exist solely in order to 'preven[t] federal court judgments that must be paid out a State's treasury,' * * *; it also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" 517 U.S. at 58 (citing *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994), and *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

Indeed, the theory of *Ex parte Young*, 209 U.S. 123 (1908) – upon which the Eighth Circuit purported to rely – is that "a suit challenging the constitutionality of a state official's action * * * is *not* one against the State." *Green*, 474 U.S. at 68

(emphasis added). That decision accordingly cannot justify *naming* the State as a defendant in federal court. The Eighth Circuit thus surely erred in holding that *Ex parte Young* authorized its assertion of jurisdiction over South Dakota.[9]

b. The Eighth Circuit also was manifestly wrong when it found that the Eleventh Amendment did not deny it jurisdiction to decide the *SDDS VIII* suit insofar as it was directed against state officials. Under *Ex parte Young*, of course, state officials may be enjoined not to violate federal law. See 209 U.S. at 155-156. But the *Ex parte Young* doctrine by its terms applies only "where a plaintiff alleges an *ongoing* violation of *federal* law, and where the relief sought is *prospective* rather than *retrospective*." *Coeur d'Alene Tribe*, 521 U.S. at 294 (opinion of O'Connor, J.) (emphasis in original). Indeed, the Court made clear in *Ex parte Young* itself that federal jurisdiction does *not* attach when the plaintiff is "merely making [a state official] a party as a representative of the State, and thereby attempting to make the state a party." 209 U.S. at 157. In particular, the Eleventh Amendment precludes suits that are nominally directed at state officials when the relief sought "is tantamount to an award of damages for a past violation of

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[9] In issuing the injunction against the "state defendants" – which included the State of South Dakota, as is obvious from the caption of *SDDS VI* – the Eighth Circuit may have assumed that inclusion of the State in its order was immaterial because its ruling also was directed against individual state officials. But as this Court expressly held in *Pugh*, 438 U.S. 781, that assumption is incorrect because the State "has an interest in being dismissed * * * to eliminate the danger of being held in contempt it if should fail to comply with the mandatory injunction." *Id.* at 782. Indeed, the Court granted certiorari in *Pugh* for the sole purpose of dismissing the case against the State of Alabama and its Board of Corrections, based on their Eleventh Amendment immunity. *Ibid.* See also *Treasure Salvors*, 458 U.S. at 686-88; *Tindal* v. *Wesley*, 167 U.S. 204, 223 (1897).

federal law, even though styled as something else." *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986) (footnote omitted). See *Green*, 474 U.S. at 68; *Edelman*, 415 U.S. at 666.

Indeed, *Green* v. *Mansour* applied that principle to reject a claim that was virtually identical in principle to the one in *SDDS VIII*. In *Green*, the plaintiff brought an action in federal court seeking "a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law." 474 U.S. at 67. This Court held the suit barred by the Eleventh Amendment, explaining that

> the award of a declaratory judgment in this situation would be useful in resolving the dispute over the past lawfulness of respondent's action only if it might be offered in state-court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed. *But the issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment.* * * * [A] declaratory judgment is not available when the result would be a partial "end run" around our decision in *Edelman* v. *Jordan* * * *.

Id. at 73 (emphasis added).

That conclusion should have disposed of the *SDDS VIII* litigation in the Eighth Circuit. While the federal court may have had jurisdiction to hear a suit challenging *prospective* application of the ballot referendum in *SDDS VI* (although the court did not, of course, have jurisdiction to treat the *State itself* as a party in that proceeding), by the time the *SDDS VIII* action was filed, "there [was] no continuing violation of federal law to enjoin." *Green*, 474 U.S. at 64. After the Eighth Circuit held the ballot referendum unconstitutional in 1995, neither the State

nor any state officers made any attempt to enforce it; the state-court suit that *SDDS VIII* enjoined sought *past* damages for a temporary taking that already had expired.[10] Against this background, the express (and only) goal of the *SDDS VIII* litigation was to dictate the outcome of respondent's state-court suit against the State, which seeks *retroactive* monetary compensation. As in *Green*, the relief sought by respondent in *SDDS VIII* thus had "much the same effect as a full-fledged award of damages or restitution by the federal court." 474 U.S. at 73. Indeed, the jurisdictional defect was much clearer in *SDDS VIII* than it was in *Green*. There, the Court's concern was that a declaratory judgment might have res judicata effects in hypothetical future litigation against the State; in *SDDS VIII*, the federal court enjoined the State not to contest liability in a *pending* damages action in state court. The State of South Dakota is entitled to pursue its argument that this judgment should be vacated as void.

B. The Eighth Circuit's Holding That A Party May Not Seek To Vacate A Void Judgment Under Rule 60(b)(4) Without First Having Appealed And Sought Certiorari Exacerbates A Conflict In The Circuits And Departs From Decisions Of This Court

The second half of the Eighth Circuit's holding – that relief under Rule 60(b)(4) is unavailable because the State failed to seek certiorari to obtain review of the challenged judgments in *SDDS VI* and *SDDS VIII* – also warrants this Court's attention. The analysis used below exacerbates a long-standing conflict in the courts of appeals about the applicability of Rule 60(b)(4) in these circumstances, and cannot be squared with a dispositive holding of this Court. Because the error below

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[10] The Eighth Circuit issued its opinion in *SDDS VIII* in October 1996, more than 18 months after the period of the temporary taking ceased. See *SDDS* v. *State*, 569 N.W.2d at 292.

regarding Rule 60(b)(4) compounds and is closely related to the Eighth Circuit's misunderstanding of the Eleventh Amendment, further consideration of the issue by this Court is in order.

1. At the outset, the decision below on Rule 60(b)(4) contributes to a deeply rooted split in the circuits. The Eighth Circuit's decision that the rule cannot be used to "attack a final court of appeals' ruling in lieu of a proper petition for review in the United States Supreme Court" (App., *infra*, 4a) squarely conflicts with the decision of the Sixth Circuit in *Jordan* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974). In *Jordan*, the district court ruled against a State, awarding attorneys' fees and expenses. *Id.* at 703-704. No appeal was taken from the order awarding fees, and when the judgment remained unpaid after eight months, the plaintiffs received a writ requiring a bank holding state funds to turn over the amount of the judgment. *Id.* at 704. The State then filed a Rule 60(b) motion, arguing that the judgment against the State should be vacated as void on Eleventh Amendment grounds. *Ibid.*

The Sixth Circuit held that the motion should have been granted, even though the State had failed to object to the award "until after the judgment was entered and execution proceedings undertaken," and even though the State had failed to appeal the judgment. 500 F.2d at 710. The court explained that "a void judgment is no judgment at all and is without legal effect," and that "[a] party cannot be precluded from raising the issue of voidness in a direct or collateral attack because of the failure to object prior to, or at the time of, entry of the judgment." *Ibid.* The court therefore held that, "once it is determined that a state is not subject to federal jurisdiction because of the operation of the Eleventh Amendment, a court must vacate any judgment entered in excess of its jurisdiction." *Ibid.* That decision conflicts squarely with the holding below.

The Eighth Circuit's decision also cannot be reconciled with the holdings of other courts of appeals that have followed the Sixth Circuit's approach. In *Watts* v. *Pinckney*, 752 F.2d 406 (9th Cir. 1985), the Ninth Circuit affirmed the grant of a Rule 60(b)(4) motion to a movant who had "not appeal[ed] the judgment against him." *Id.* at 407. Relying on *Jordan*, the court held that, because "the judgment against [the movant] was void," he "was entitled to restitution under [Rule] 60(b)(4)." *Id.* at 410. The court explained: "The district court was compelled to exercise its authority under Rule 60(b)(4) to vacate the judgment against [the movant]. 'A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside.'" *Ibid.* (quoting *Jordan*, 500 F.2d at 704).

Similarly, in *Carter* v. *Fenner*, 136 F.3d 1000 (5th Cir. 1998), the Fifth Circuit expressly rejected the argument that Rule 60(b)(4) relief is unavailable when the movant had failed to appeal the challenged judgment: "While [the movant] did not file a notice of appeal * * * its motion pursuant to Rule 60(b) was timely." *Id.* at 1006. The court reasoned that, although failure to appeal may militate against the grant of relief under Rule 60(b)(6), "[m]otions brought pursuant to Rule 60(b)(4) * * * constitute such exceptional circumstances as to relieve litigants from the normal standards of timeliness associated with the rule." *Ibid.* Again, the Eighth Circuit's decision cannot be reconciled with these holdings.

On the other hand, the Eighth Circuit's approach was endorsed by the Third Circuit in *Vecchione* v. *Wohlgemuth*, 558 F.2d 150 (3d Cir. 1977). There, the court held that Rule 60(b)(4) could *not* be used to vacate a judgment against state defendants that the State had failed to appeal. The Third Circuit reasoned that "[i]f, as the cases indicate, eleventh amendment immunity from suit in a federal court may be waived, that waiver must be deemed to have become final at the

latest when the resulting judgment has become final." *Id.* at 159. Because in *Vecchione* the Eleventh Amendment challenge to the judgment "was not made until almost a year after the time for appeal from the [challenged] order had expired," the court held Rule 60(b)(4) relief unavailable. *Ibid.* In reaching this conclusion, the Third Circuit expressly "disagree[d] with the holding in *Jordan* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974) that a claim of sovereign immunity can be raised by a Rule 60(b)(4) motion at any time." 558 F.2d at 159 n.7. We note, however, that the Eighth Circuit in this case went beyond even the holding of *Vecchione*: although the Third Circuit held that Rule 60(b)(4) relief is unavailable if the movant failed to *appeal* the challenged judgment, the court below also held such relief unavailable if the movant failed to seek *discretionary review in this Court*.

This conflict involves a recurring issue that may arise in a range of settings and – as this case demonstrates – bears on matters of considerable importance to the States' sovereign interests. It should be resolved by this Court.

2. That is particularly so because the decision below on Rule 60(b)(4) is wrong, for several reasons. *First*, the Eighth Circuit appeared to believe that an appeal is necessary before a party seeks Rule 60(b)(4) relief because the Rule 60(b)(4) motion otherwise would substitute a "collateral[] attack" on the challenged judgment for direct appeal. App., *infra*, 4a. This analysis, however, turns on a plain misunderstanding of the Rule 60(b)(4) mechanism. A Rule 60(b)(4) "attack on [a] judgment [i]s *direct, not collateral*," and "[t]he doctrine of res judicata does not apply to direct attacks on judgments." *Watts*, 752 F.2d at 410 (emphasis added). See *In re Gledhill*, 76 F.3d 1070, 1082 (10th Cir. 1996) ("'It is elementary, of course, that res judicata does not preclude a litigant from making a direct attack upon the judgment before the court that renders it.'") (citation omitted); *Jordan*, 500 F.2d at 710. At the same time,

it is black letter law that, "if a court determines that a judgment is truly void, * * * the court really has no discretion at all; it must recognize that the judgment is a nullity and grant relief." 12 Daniel R. Coquillette et al., MOORE'S FEDERAL PRACTICE § 60.44[5][a], at 60.150 (Matthew Bender ed. 1999). Against this background, there is nothing in Rule 60(b)(4) – or in any other source of law – that precludes the grant of relief simply because the movant failed to appeal (or seek certiorari from) the challenged judgment.

Second, even if a prior appeal somehow were thought to be a prerequisite for Rule 60(b)(4) relief in other circumstances, that requirement would not apply in cases like this one, where the challenged judgment was void because inconsistent with sovereign immunity principles. Indeed, this Court has held that the sovereign may make even a *true* collateral attack on such a judgment. In *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), a court in Missouri ruled against the United States, notwithstanding the United States' failure to waive its sovereign immunity. The United States did not seek review of that decision on appeal. The plaintiff then asserted that the Missouri judgment should be given res judicata effect in a second suit in Oklahoma. 309 U.S. at 509-511. After noting that the Missouri judgment was "void" because the sovereign immunity of the United States may be waived only by statute and not by government officials (*id.* at 512-513) – the rule that also applies to waivers of state immunity under the Eleventh Amendment – the Court held:

> *[t]he reasons for the conclusion that this immunity may not be waived [through the participation of government officials in litigation against the sovereign] govern likewise the question of res judicata.* * * * Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to

> this exercise of judicial power. Public policy forbids the suit unless consent is given.

Id. at 514 (emphasis added). The Court therefore held that the United States was not bound by the initial, void judgment. *Id.* at 514-515. That conclusion necessarily applies *a fortiori* in this case, where the sovereign is launching a direct, rather than a collateral, attack on the void judgment.

Third, the Eighth Circuit's holding simply has no conceivably plausible basis when it requires a party seeking Rule 60(b)(4) relief to have sought not only appellate relief from the challenged judgment, but also *certiorari review in this Court*. There are many reasons why a party might not seek review in this Court of an adverse appellate judgment, not the least of them the recognition that most appellate judgments do not present certworthy issues and that most certiorari petitions are (deservedly) denied. Punishing a litigant that failed to file a certiorari petition by subsequently precluding review of its Rule 60(b)(4) motion therefore is fundamentally inequitable and finds no support in the policy of the rule. Such an approach also will force many litigants to file insubstantial petitions in this Court solely to protect their right to pursue a Rule 60(b)(4) remedy in the future should the need and opportunity to do so arise. Needless to say, a holding with such implications is insupportable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2001

United States Court of Appeals,
Eighth Circuit.

In re: SDDS, INC., a South Dakota,
Corporation, Petitioner.

SDDS, Inc., Appellee/Cross-appellant,

v.

State of South Dakota, Appellant/Cross-appellee.

Mark W. Barnett, Attorney General of the State of South Dakota; Joyce Hazeltine, Secretary of State of South Dakota; George S. Mickelson, Governor of the State of South Dakota, Defendants.

Action for the Environment,
Intervenor Defendant.

Nos. 98-3588, 99-1034, 99-1035.

Submitted: May 8, 2000.
Filed: Sept. 15, 2000.

Before McMILLIAN, JOHN R. GIBSON and BEAM, Circuit Judges.

McMILLIAN, Circuit Judge.

This matter began in 1991 with a complaint filed in the United States District Court for the District of South Dakota by SDDS, Inc. (SDDS), against the State of South Dakota (the State), seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. Since then, the case has come before this court on three separate occasions, see *SDDS, Inc.* v. *State of South Dakota*, 994 F.2d 486 (8th Cir. 1993) (*SDDS III*); *id.*, 47 F.3d 263 (8th Cir. 1995) (*SDDS VI*); *id.*, 97 F.3d 1030 (8th Cir. 1996) (*SDDS VIII*), and related litigation has been ongoing in

the South Dakota state courts. Now, on this fourth visit to the Eighth Circuit, the parties present us with the following: (1) an appeal by the State from the district court order denying the State's motion pursuant to Fed. R. Civ. P. 60(b) to set aside prior federal court judgments; (2) an appeal by the State and cross-appeal by SDDS from an order of the district court awarding SDDS attorneys' fees and costs; and (3) a petition to recall, clarify, and supplement the mandate issued pursuant to our decision in *SDDS VIII*. For reasons stated below, we affirm the orders of the district court,[1] and we deny SDDS's petition to recall the mandate.

The background facts have been stated in our prior opinions. See *SDDS VIII*, 97 F.3d at 1032-34. Briefly summarized, this litigation arises out of an unsuccessful effort by SDDS to construct and operate a multistate solid waste disposal (MSWD) facility near Edgemont, South Dakota. Opposition to the MSWD facility prompted, among other things, two ballot initiatives. The second ballot initiative, or referendum, effectively ended SDDS's plan to develop the MSWD facility. See *id.* at 1033 ("The electorate vetoed the MSWD facility, which 'shut down' SDDS's MSWD site."). SDDS brought the present § 1983 action against the State and numerous state officials (collectively the defendants) in federal district court alleging that the second ballot initiative violated the dormant commerce clause. SDDS also filed an action against the defendants in South Dakota state court to recover just compensation for an alleged de facto "taking," or inverse condemnation, of its property by way of the referendum.

For nearly ten years, the two cases — one in federal court, the other in state court — followed long, convoluted, and intertwined procedural journeys. Along the way, we twice reversed summary judgment dispositions by the district court in favor of the defendants. See *SDDS III*, 994 F.2d at 494;

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[1] The Honorable Richard H. Battey, Chief Judge, United States District Court for the District of South Dakota.

SDDS VI, 47 F.3d at 272. Consistent with our decision in *SDDS VI*, the district court, on April 24, 1995, entered judgment in favor of SDDS and against the defendants, declaring that the second ballot initiative violated the dormant commerce clause and assessing costs to the defendants. In F.3d at 1041-42, *SDDS VIII*, 97 we instructed the district court to enter an order enjoining the defendants from relitigating certain specified issues in the state court proceedings. After the mandate for *SDDS VIII* issued on November 15, 1996, the district court issued the required injunction on December 12, 1996. The South Dakota Supreme Court held that the state courts were bound by the district court's order granting the defendants injunctive relief, notwithstanding its disagreement with that order on the merits, and, on May 18, 1998, the United States Supreme Court denied the defendants' resulting petition for a writ of certiorari. See *SDDS, Inc.* v. *State*, 569 N.W.2d 289, 293-95 & n.9 (S.D. 1997) (*SDDS IX*), *cert. denied*, 523 U.S. 1118, 118 S. Ct. 1796, 140 L.Ed.2d 937 (1998) (*SDDS X*).

On June 9, 1998, the State moved pursuant to Fed. R. Civ. P. 60(b)(4) to set aside the district court's judgments of April 24, 1995, and December 12, 1996, on the ground that those prior final decisions were void because they were entered in violation of the Eleventh Amendment. On August 24, 1998, the district court denied the State's Fed. R. Civ. P. 60(b) motion.See *SDDS* v. *State of South Dakota*, No. CIV. 91-5121 (D.S.D. Aug. 24, 1998). SDDS then moved in the district court for attorneys' fees and costs incurred in opposing the State's Fed. R. Civ. P. 60(b) motion, and the State opposed SDDS's request. On November 6, 1998, the district court awarded SDDS attorneys' fees and costs, but not the full amount of attorneys' fees requested. See *SDDS* v. *State of South Dakota*, No. CIV. 91-5121 (Nov. 6, 1998).

Appeal No. 98-3588

The State appeals from the district court's order of August 24, 1998, denying the State's Fed. R. Civ. P. 60(b)

motion.Upon careful review, we hold that the district court did not err in denying the State relief pursuant to Fed. R. Civ. P. 60(b)(4) because the State did not seek review, by petition for writ of certiorari, of either *SDDS VI* or *SDDS VIII* and instead has attempted to collaterally attack those final decisions by way of a Rule 60(b) motion in the district court. Just as a Rule 60(b) motion cannot be used to relitigate the merits of a district court's prior judgment in lieu of a timely appeal, nor can it be used to collaterally attack a final court of appeals' ruling in lieu of a proper petition for review in the United States Supreme Court. *Cf. Kocher* v. *Dow Chemical Co.*, 132 F.3d 1225, 1229 (8th Cir. 1997) ("A party may not use a Rule 60(b)(4) motion as a substitute for a timely appeal. In other words, if a party fails to appeal an adverse judgment and then files a Rule 60(b)(4) motion after the time permitted for an ordinary appeal has expired, the motion will not succeed merely because the same argument would have succeeded on appeal."). Moreover, while the Eleventh Amendment provides the State with a defense, it does not automatically deprive the federal courts of original jurisdiction.See *Wisconsin Dep't of Corrections* v. *Schacht*, 524 U.S. 381, 389, 118 S. Ct. 2047, 141 L.Ed.2d 364 (1998) ("The Eleventh Amendment ... does not automatically destroy original jurisdiction.Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense."). As in the present case, "[a] state may ... waive its Eleventh Amendment immunity through its conduct. Courts have inferred a waiver when the State has made a general appearance in federal court and defended a lawsuit on the merits." *Hankins* v. *Finnel*, 964 F.2d 853, 856 (8th Cir.) (citations omitted), cert. denied, 506 U.S. 1013, 113 S. Ct. 635, 121 L.Ed.2d 566 (1992). In the present case, the State for many years actively and vigorously litigated the merits of SDDS's claims in federal court, never once raising an Eleventh Amendment immunity defense until after the mandates had been issued and our decisions in *SDDS VI* and *SDDS VIII* were final. In light of the State's conduct, it would appear that the

State has waived any sovereign immunity defense it may have had to the claims addressed in *SDDS VI* and *SDDS VIII*. The district court's order of August 24, 1998, is affirmed.

Cross-appeals Nos. 99-1034/1035

The State also appeals the district court's November 6, 1998, award of attorneys' fees and costs, again relying on the argument that the underlying judgments were void on Eleventh Amendment grounds. SDDS cross-appeals, arguing that the district court abused its discretion in failing to award the full amount of attorneys' fees requested.

Upon review, we note that the State's appeal from the award of attorneys' fees and costs assumes success on its appeal from the district court's August 24, 1998, decision, involving the merits of the State's belated Eleventh Amendment defense. Having affirmed the August 24, 1998, order, we find no basis for reversing the district court's decision to award SDDS attorneys' fees and costs. (It would, of course, defy logic to permit the State to invoke its Eleventh Amendment argument to now preclude SDDS from recovering attorneys' fees and costs which were incurred in defeating that very argument.)

Furthermore, on careful review of the district court's determination of SDDS's reasonable attorneys' fees, we hold that the district court did not abuse its discretion in declining to award SDDS's entire request. The district court's order of November 6, 1998, is affirmed.

Petition to recall the mandate

In the spring of 1999, the inverse condemnation case in South Dakota state court proceeded to trial before a jury on the issue of SDDS's damages. On April 6, 1999, the jury found that SDDS's damages amounted to $10.1 million.The State moved for judgment notwithstanding the verdict (JNOV) or a new trial, and, on January 6, 2000, the state trial court held a hearing on the motion.Ruling from the bench, the state trial

court denied the State's motion for JNOV but granted a new trial on the basis of instructional error. Thereafter, on February 23, 2000, SDDS challenged that ruling by filing a petition in this court requesting that we recall, clarify, and supplement our mandate in *SDDS VIII*. In essence, SDDS argues that the state trial court has misconstrued the federal injunction, and we should therefore reopen and revise our earlier decision in order to compel a different ruling by the state court. SDDS describes the relief it seeks as follows: "This would necessarily consist [of] an additional direction to the district court to enjoin the Defendants and the state trial court from relitigating any of those issues expressly and by necessary implication decided by this Court in *SDDS VI* or *SDDS VIII*." SDDS's Petition to Recall, Clarify and Supplement Mandate at 12 (emphasis added). In *SDDS VIII*, we directed the district court to enjoin the defendants, not the state courts, from relitigating certain issues. The district court complied with our directions, and the South Dakota Supreme Court ruled that the district court's order is binding upon the state courts. We do not, however, sit as a court of appeals over the South Dakota courts. We have neither the power nor the inclination to provide the extraordinary relief SDDS requests. The petition to recall the mandate is denied.

SDDS, INC., a South Dakota corporation, Plaintiff

vs.

STATE OF SOUTH DAKOTA, MARK BARNETT, as Attorney General for the State of South Dakota; WILLIAM JANKLOW, as Governor of the State of South Dakota, and JOYCEHAZELTINE, as Secretary of State of the State of South Dakota, Defendants, and ACTION FOR THE ENVIRONMENT, Intervener/Defendant.

CIV. 91-5121

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, WESTERN DIVISION

August 24, 1998, Decided
August 24, 1998, Filed

DISPOSITION: Defendants' motion to set aside judgments (Docket # 154) denied.

ORDER

On April 24, 1995, this Court entered judgment in favor of plaintiff and against defendants declaring that South Dakota's referral of S.B. 169 violated the dormant commerce clause of the Constitution of the United States and 42 U.S.C. § 1983, and assessing costs to defendants.

This judgment was entered in accordance with the opinion and judgment of the United States Court of Appeals for the Eighth Circuit, dated February 6, 1995, and the mandate of that Court issued March 16, 1995.

On December 12, 1996, this Court entered judgment for plaintiff and against defendants restraining and enjoining them and their officers, agents, servants, employees, and attorneys, and all those persons in active concert or participation with them who receive actual notice of this order, from relitigating

in the South Dakota state courts the issue of (1) whether SDDS had a legitimate claim of entitlement to a permit to operate a multi- state solid waste disposal site, and (2) whether the referendum was the proximate cause of SDDS's dissolution.

This judgment was entered in accordance with the opinion and judgment of the United States Court of Appeals for the Eighth Circuit dated October 3, 1996, the mandate of the Court of Appeals issued November 15, 1996, and that Court's order relating to attorney's fees and costs dated November 29, 1996. On June 9, 1998 defendants filed a motion to set aside the above judgments.

Defendants' motion has been duly considered by this Court in light of the judgments and mandates of the Eighth Circuit Court of Appeals.

Accordingly, it is hereby

ORDERED that defendants' motion to set aside judgments (Docket # 154) is denied.

Dated this 24th day of August, 1998.

BY THE COURT:

RICHARD H. BATTEY

CHIEF JUDGE

United States Court of Appeals,
Eighth Circuit.

In re SDDS, INC., a South Dakota
Corporation, Petitioner.

No. 96-2705.

Submitted Aug. 26, 1996.
Decided Oct. 3, 1996.

Before MAGILL, JOHN R. GIBSON, and BEAM, Circuit Judges.

MAGILL, Circuit Judge.

South Dakota Disposal Systems, Inc. (SDDS) moved the district court to enjoin the State of South Dakota and various state officials in their official capacities, including Mark W. Barnett, Attorney General of the State of South Dakota, Walter D. Miller, Governor of the State of South Dakota, and Joyce Hazeltine, Secretary of the State of South Dakota (Defendants) from relitigating in the South Dakota state courts certain issues previously decided by this Court. The district court denied this motion, and SDDS now petitions this Court for a writ of mandamus, directing the district court to issue the injunction.Defendants object, arguing that this relief is improper under both the Eleventh Amendment and the Anti-Injunction Act, 28 U.S.C. § 2283. We disagree, and conclude that injunctive relief is proper in the circumstances of this case. Construing SDDS's petition as an appeal of the district court's denial of injunctive relief, we reverse.

I.

On the last occasion during which these parties were before us, we stated that it was "the latest in a seemingly never-ending series of cases arising from SDDS's six-year-long struggle to develop a large-scale [multistate solid waste disposal, or MSWD] facility near Edgemont, South Dakota." *SDDS, Inc.* v. *State of S.D.*, 47 F.3d 263, 265 (8th Cir. 1995) (*SDDS VI*).

This description was unfortunately prescient; one-and-a-half years after penning those words, litigation continues in both state and federal courts concerning SDDS's efforts to construct and operate the MSWD facility. In this latest incarnation of the case, we are called upon to determine if the Defendants are attempting to relitigate issues decided previously by this Court and, if so, whether the Defendants should be enjoined from attempting such relitigation.

The facts of this case have been stated and restated by a variety of courts; see *SDDS VI*, 47 F.3d at 265-67; *SDDS, Inc.* v. *State of S.D.*, 994 F.2d 486, 488-91 (8th Cir. 1993) (*SDDS III*); *SDDS, Inc.* v. *State of S.D.*, 843 F. Supp. 546, 548-52 (D.S.D.1994) (*SDDS V*), *rev'd*, *SDDS VI*, 47 F.3d at 265; *Matter of 1990 Renewal Application of SDDS*, 507 N.W.2d 702, 702-03 (S.D.1993) (*SDDS IV*); *SDDS, Inc.* v. *State*, 481 N.W.2d 270, 271- 72 (S.D.1992) (*SDDS II*); *Matter of SDDS, Inc.*, 472 N.W.2d 502, 504-06 (S.D.1991) (*SDDS I*); *SDDS, Inc.* v. *State of S.D.*, Civil Case No. 93- 324 (S.D. 6th Jud. Cir. Ct. Jan.17, 1996) (*SDDS VII*),[2] and only a brief summary need be provided here. SDDS purchased land in Fall River County, South Dakota, in 1988, with the intention of constructing the "Lonetree" facility, an MSWD site. In 1989, SDDS was successful in obtaining from the South Dakota Board of Minerals and Environment (Board) a one-year permit to site, construct, and operate the MSWD facility. In 1990, the Board granted SDDS a five-year renewal of its permit. Both permits were challenged in South Dakota state courts[3]. In *SDDS I*, the

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[2] This is, of course, not a complete list of prior judicial recitations of the facts of this case.

[3] Under South Dakota law, an aggrieved party may appeal an adverse administrative decision to the state courts. See SDCL 1-26-30. "'A final determination of an agency decision is reached when the reviewing court, after deciding the correctness of the matter on review, affirms the decision or

South Dakota Supreme Court ruled that the one-year permit was invalid because the Board had made insufficient findings of fact. See *id.*, 472 N.W.2d at 513. In *SDDS IV*, the South Dakota Supreme Court held that, because the one-year permit had been declared invalid, the five-year renewal was void ab initio. See *id.*, 507 N.W.2d at 704. In 1991, on remand after *SDDS I*, the Board made the required specified findings that the proposed MSWD facility was environmentally safe and was in the public interest. See *SDDS VI*, 47 F.3d at 265 n.5 (detailing subsequent administrative history).[4]

During the course of the litigation over the Board's initial grant of permits to SDDS, the South Dakota electorate decided two ballot initiatives. The first, Initiative Measure No. 1, was approved in 1990, and required legislative approval of large-scale solid waste disposal sites. SDDS unsuccessfully challenged Initiative Measure No. 1 in the South Dakota trial court, see *SDDS, Inc.* v. *State of S.D.*, Civil Case No. 90-412 (S.D. 6th Cir. Ct. Oct. 31, 1991), and did not appeal to the South Dakota Supreme Court. The South Dakota legislature approved SDDS's MSWD site by passing 1991 Senate Bill 169. This bill was signed by the South Dakota governor, and was to

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remands it to the agency for reconsideration and a decision in accord with that court's directive.'" *Matter of Exploration Permit Renewal, Etc.*, 323 N.W.2d 858, 860 (S.D.1982) (quoting *Matter of Silver King Mines, Permit EX-5*, 315 N.W.2d, 689, 693 (S.D.1982) (Morgan, J., dissenting)).

[4] It does not appear that any South Dakota state court has addressed the merits of the Board's 1991 findings that the MSWD facility was environmentally safe and in the public interest. Rather, upon judicial review, the case was remanded to the Board "for the opportunity to reissue Original Permit" because the original permits had been invalidated. See Br. in Support of Resp't's Answer at 4. SDDS never received reissued permits.

take effect on July 1, 1991. See *SDDS II*, 481 N.W.2d at 272 (determining effective date of 1991 Senate Bill 169).

The other ballot initiative decided by the South Dakota electorate was a referendum on Senate Bill 169, requiring voter approval of SDDS's MSWD site. See *SDDS VI*, 47 F.3d at 266. The electorate vetoed the MSWD facility, which "shut down" SDDS's completion of the Lonetree site. See *SDDS IV*, 507 N.W.2d at 703[5]. SDDS challenged the referendum measure in federal court, arguing that it offended the dormant commerce clause. We reversed the district court's grant of summary judgment to the defendants twice, first holding that the unsuccessful challenge to Initiative Measure No. 1 in the South Dakota trial court did not act to collaterally estop the challenge to the referendum, see *SDDS III*, 994 F.2d at 494, and later holding that the referendum violated the dormant commerce clause. See *SDDS VI*, 47 F.3d at 272 (reversing *SDDS V*).

During the course of this wide ranging litigation, SDDS never opened its proposed MSWD site. In 1994, it sold the land planned for the development of the MSWD and went out of business. SDDS brought suit against the Defendants in South Dakota state court to recover just compensation for an alleged uncompensated "taking" of its property by the Defendants through the unconstitutional referendum, in violation of the Fifth and Fourteenth Amendments. The South Dakota state trial court granted summary judgment to the Defendants, holding that SDDS had no property right in operating an MSWD site, and that the referendum was not a

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[5] At the time the referendum was decided by the South Dakota voters, SDDS was still operating under its five-year renewal permit. It was several years after the referendum placed "Senate Bill 169 in limbo," *SDDS IV*, 507 N.W.2d at 703, long after SDDS incurred its alleged injuries, that the South Dakota Supreme Court declared SDDS's five-year renewal permit "void ab initio." *Id.* at 704.

proximate cause of SDDS's losses. See *SDDS VII*, Mem. Op. at 11, 18, 24-25. The appeal of *SDDS VII* is pending before the South Dakota Supreme Court.

Contending that the Defendants were attempting to relitigate issues decided by this Court in *SDDS VI*, SDDS sought an injunction in the federal district court against the Defendants. The district court summarily denied injunctive relief,[6] and SDDS now petitions this Court for a writ of mandamus. SDDS requests that we require the district court to issue an injunction against the Defendants, forbidding them from relitigating in the South Dakota state courts the issues of (1) whether SDDS had a legitimate claim of entitlement to a permit to operate an MSWD, and (2) whether the referendum was the proximate cause of SDDS's dissolution. The Defendants object to the issuance of the writ, arguing that the standards for a writ of mandamus have not been satisfied, that the Eleventh Amendment prohibits this suit, that the Anti- Injunction Act forbids issuance of the writ, and that injunctive relief is not

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[6] The district court stated:

> On April 11, 1996, SDDS filed a motion for the issuance of an order to show cause, for a speedy hearing, and for a preliminary and a permanent injunction pursuant to the Declaratory Judgments Act and the All Writs Act. The state defendants responded on May 6, 1996. SDDS filed a reply on May 23, 1996. Essentially, SDDS's claim for injunctive relief seeks to have this Court enjoin a proceeding before the South Dakota Supreme Court. This Court declines to take such action.Accordingly, having considered the matter, it is hereby ORDERED that SDDS's motion for an order to show cause and for injunctive relief (Docket # 133) is denied.

SDDS, Inc. v. *State of S.D.*, Civil No. 91-5121 (D.S.D. May 28, 1996), reprinted in I Appellant's App. at Tab 12.

warranted by the facts of the case. We address each of these arguments in turn.

II.

The issuance of a writ of mandamus "is a drastic remedy to be invoked only in extraordinary situations," *Melahn* v. *Pennock Ins., Inc.*, 965 F.2d 1497, 1501 (8th Cir. 1992) (quotations omitted), and may issue "only if a petitioner is able to establish a clear and indisputable right to the relief sought, the defendant has a nondiscretionary duty to honor that right, and the petitioner has no other adequate alternative administrative or judicial remedy." *In re Lane*, 801 F.2d 1040, 1042 (8th Cir. 1986) (quotations and citations omitted). The Defendants argue that a writ of mandamus is inappropriate to require a district court to issue an injunction, because such relief is left to the discretion of the district court. See *id.* ("Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is clear and indisputable." (quotations and citations omitted)).

We need not reach the question of whether a writ of mandamus may issue to correct a district court's abuse of discretion in denying injunctive relief. A denial of an injunction is an immediately appealable interlocutory order, see 28 U.S.C. § 1292(a)(1). Where the liberal standards for notice of appeal have been met in a case, a petition for a writ of mandamus may be construed as a notice of appeal from an immediately appealable order by a district court. See *United States* v. *Gundersen*, 978 F.2d 580, 583-84 (10th Cir. 1992) (construing petition for mandamus as notice of appeal, and citing cases); *United States* v. *Green*, 499 F.2d 538, 540 n.5 (D.C. Cir. 1974) (per curiam) (citing cases). Here, SDDS's petition for mandamus "was the functional equivalent of a notice of appeal [because] it fulfilled [Fed. R. App. P.] 3's requirements concerning notice," Gundersen, 978 F.2d at 583 (analyzing *Smith* v. *Barry*, 502 U.S. 244, 112 S. Ct. 678, 116 L.Ed.2d 678 (1992)). SDDS's petition specified the party

taking the appeal, designated the district court order appealed from, and named the court to which the appeal was taken.See *id.*; see also Fed. R. App. P. 3(c). In all of the circumstances of this case, therefore, we believe it is appropriate to construe SDDS's petition for a writ of mandamus as a notice of appeal.

III.

The Eleventh Amendment generally bars suits brought against the states in federal courts. While the specific language of the Eleventh Amendment refers only to "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State," U.S. Const. amend. XI,

> we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition which it confirms. That presupposition, first observed over a century ago in *Hans* v. *Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L.Ed. 842 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States.

Seminole Tribe of Fla. v. *Florida*, 517 U.S. 44, ----, 116 S. Ct. 1114, 1122, 134 L.Ed.2d 252 (1996) (citations and quotations omitted).

The immunity recognized by the Eleventh Amendment extends to both suits for monetary damages and those for declaratory or injunctive relief; "The Eleventh Amendment does not exist solely in order to prevent federal court judgments that must be paid out of a State's treasury; it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Id.* at

----, 116 S. Ct. at 1124. South Dakota and its state officials sued in their official capacities would, therefore, normally be immune from suit in the federal courts.

In Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908), however, the Supreme Court established a fundamental exception to the Eleventh Amendment's immunity doctrine:

> Ex parte Young recognized that suits may be brought in federal court against state officials in their official capacities for prospective injunctive relief to prevent future violations of federal law. The doctrine of Ex parte Young is based on the idea that the power of federal courts to enjoin continuing violations of federal law is necessary to vindicate the federal interest in assuring the supremacy of that law.

Fond du Lac Band of Chippewa Indians v. *Carlson*, 68 F.3d 253, 255 (8th Cir. 1995) (quotations and citations omitted). See also *Denke* v. *South Dakota Dep't of Social Servs.*, 829 F.2d 688, 689 (8th Cir. 1987) ("Eleventh amendment analysis is an area dominated by formalistic rules, often neither intuitive nor strictly rational. However, over years of development, important exceptions to state immunity from suit have been recognized which allow citizens to vindicate rights infringed upon by state authorities. Extremely important in this regard is the substantial exception to the scope of the eleventh amendment represented by the case of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908)[,] and its progeny.").

Defendants did not contend that *SDDS VI* was improperly heard by this Court in violation of the Eleventh Amendment, and we do not believe that any such argument could have been successful. As a suit for prospective declaratory relief from South Dakota's ongoing violation of the dormant commerce clause, the Defendants could not have enjoyed immunity under the Eleventh Amendment in *SDDS VI*. See *Ex parte Young*,

209 U.S. at 159, 28 S. Ct. at 454 ("the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity").

The question presented is therefore whether the Defendants, who had been properly sued for declaratory relief in a prior suit, can now assert Eleventh Amendment immunity from this suit for prospective injunctive relief which seeks only to effectuate our earlier judgment. An affirmative answer would allow these Defendants, and all future state defendants, to effectively ignore judgments rendered in the federal courts, generating needless relitigation in the state courts, and rendering our judgments largely nugatory and advisory[7]. This

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[7] Indeed, it is clear that this is precisely what the Defendants in this case have attempted to do to our judgment in *SDDS VI* almost from the moment the decision was filed. Upon our remand of the case to the district court for a determination of attorney's fees, the Defendants stated:

> All that has been obtained for the Plaintiff[in *SDDS VI*], however, is a declaratory judgment that the referendum was unconstitutional. The court of appeals let stand this court's important rulings on the due process and equal protection issues raised by Plaintiffs.
>
> Plaintiff has, in essence, obtained a judgment which can do it no good. [FN2 In its response to Defendants' submission on the "prevailing party" issue, Plaintiff claims in a footnote that the ruling of the court of appeals may have some application in the state "inverse condemnation" case, but Plaintiff does not explain how the court of appeals ruling on the commerce clause issue can have any application to the inverse condemnation case. Additionally, it is important to note that the state courts could agree with this court[']s ruling (which the court of appeals let stand)

> that Plaintiff had no property interest which could be unlawfully taken.] Plaintiff has in fact accomplished nothing more than obtaining "the moral satisfaction of knowing that a federal court concluded [its] rights had been violated...." *Farrar* vs. *Hobbey* [*Hobby*, 506 U.S. 103, 114, 113 S. Ct. 566, 574, 121 L.Ed.2d 494] (1992), quoting *Hewitt* v. *Helms*, 482 [U.S.] 755, 762 [107 S. Ct. 2672, 2676, 96 L.Ed.2d 654] (1987). In these circumstances, a substantial reduction in the amount awarded, or [no] award at all, see *Farrar*, 506 U.S. at 115 [113 S. Ct. at 575], is appropriate. Resp. to Mot. to Determine Award of Att'ys' Fees & Costs & Req. for Hr'g at 13-14, reprinted in I Appellant's App. at Tab 7 (ellipses in original). Contrary to the Defendants' mischaracterizations of *SDDS VI*, we did not "let stand" any portion of the district court decision in *SDDS V*; rather, we reversed the district court, and remanded the case to the district court "with instructions to enter judgment in favor of SDDS." *SDDS VI*, 47 F.3d at 272.

Similarly, in opposing SDDS's requested injunctive relief in the district court, the Defendants urged the district court to disregard our decision in *SDDS VI* by stating that:

> SDDS also argues that the Eighth Circuit decision is binding precedent on the state courts. While the United States Supreme Court has the authority to enter decisions binding on the South Dakota Supreme Court, the lower federal courts do not have such power.

State Defs.' Br. In Supp. of Resistance to Pl.'s Mot. for Order to Show Cause & for Speedy Hr'g & for Prelim. & Permanent Inj. at 14, reprinted in I Appellant's App. at Tab 10. Contrary to the Defendants' rather unique interpretation of federalism, the judgments of this Court are, in fact, entitled to the same res judicata and collateral estoppel effect in the South Dakota state courts as judgments rendered by those courts. See, e.g., *City of*

is an intolerable result, and one which is not, we believe, mandated by the Eleventh Amendment. We therefore hold that the Eleventh Amendment does not bar a suit in the federal court for injunctive relief to prohibit a state defendant from relitigating in a state court issues previously decided in a federal court.[8]

IV.

Embodying fundamental precepts of federalism and comity between federal and state courts, the Anti-Injunction Act provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly

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Tacoma v. *Tacoma Taxpayers*, 357 U.S. 320, 334, 78 S. Ct. 1209, 1217-18, 2 L.Ed.2d 1345 (1958).

[8] The Defendants, citing *Green* v. *Mansour*, 474 U.S. 64, 106 S. Ct. 423, 88 L.Ed.2d 371 (1985), argue that the instant suit for injunctive relief is in fact a "demand that this Court direct the South Dakota courts to grant SDDS a monetary award to be paid from the South Dakota state treasury." Br. In Supp. of Resp't's Answer at 13. We disagree. Green was an action for declaratory relief for an alleged past violation of constitutional rights; "the award of a declaratory judgment in this situation would be useful in resolving the dispute over the past lawfulness of respondent's action only if it might be offered in state-court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed." *Green*, 474 U.S. at 73, 106 S. Ct. at 428. By contrast, the suit before us has been brought to effectuate our judgment in *SDDS VI*, a "[r]emed[y] designed to end a continuing violation of federal law [which was] necessary to vindicate the federal interest in assuring the supremacy of that law." *Id.* at 68, 106 S. Ct. at 426.

> authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283[9]. The Supreme Court has "expressly rejected the view that the anti-injunction statute merely states a flexible doctrine of comity, and [has] made clear that the statute imposes an absolute ban upon the issuance of a federal injunction against a pending state court proceeding, in the absence of one of the recognized exceptions...." *Mitchum* v. *Foster*, 407 U.S. 225, 228-29, 92 S. Ct. 2151, 2155, 32 L.Ed.2d 705 (1972) (citing *Atlantic Coast Line R.R.* v. *Locomotive Eng'rs*, 398 U.S. 281, 286-87, 90 S. Ct. 1739, 1743, 26 L.Ed.2d 234 (1970) (note omitted)).

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[9] In *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 146, 108 S. Ct. 1684, 1689, 100 L.Ed.2d 127 (1988), the Supreme Court explained the purpose of the Anti-Injunction Act:

> The Act, which has existed in some form since 1793, see Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 335, is a necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts. It represents Congress' considered judgment as to how to balance the tensions inherent in such a system. Prevention of frequent federal court intervention is important to make the dual system work effectively. By generally barring such intervention, the Act forestalls the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court. Due in no small part to the fundamental constitutional independence of the States, Congress adopted a general policy under which state proceedings should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately [the United States Supreme Court]. (quotations and citations omitted).

Included in the Anti-Injunction Act are specific, enumerated exceptions. These exceptions, which "are designed to ensure the effectiveness and supremacy of federal law," *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 146, 108 S. Ct. 1684, 1689, 100 L.Ed.2d 127 (1988), include the relitigation exception. This exception

> was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of res judicata and collateral estoppel.

Id. at 147, 108 S. Ct. at 1690. See also *NBA* v. *Minnesota Pro. Basketball, Ltd. Partnership*, 56 F.3d 866, 871 (8th Cir. 1995) ("The legislative policy that permits a federal court to enjoin state court action when a federal court has decided a suit on its substantive merits has equal force when a critical underlying issue unrelated to the substantive merits of the action has been litigated to finality." (quotations and citations omitted)). As with all of the statutory exceptions, the relitigation exception is "narrow and [is] not to be enlarged by loose statutory construction." *Chick Kam Choo*, 486 U.S. at 146, 108 S. Ct. at 1689 (quotations and citations omitted).

We review de novo the applicability of the relitigation exception. See *NBA*, 56 F.3d at 871. In order to enjoin a state court from relitigating an issue, the issue must "actually have been decided by the federal court." *Chick Kam Choo*, 486 U.S. at 148, 108 S. Ct. at 1690. To determine if this strict and narrow prerequisite has been met, we must assess "the precise state of the record and what the earlier federal order actually said; [we may not] render a post hoc judgment as to what the order was intended to say." *Id.* (citing *Atlantic Coast*, 398 U.S. at 290, 90 S. Ct. at 1744-45 (emphasis in original)).

In an extended discussion, the district court in *SDDS V* held that SDDS had no protected property interest in operating

an MSWD facility, and that the referendum had no effect on SDDS's ability to operate an MSWD. The district court stated:

> Under South Dakota law, SDDS needs two things in order to operate its Lonetree facility: (1) a valid permit and (2) legislative approval from the South Dakota Legislature. See SDCL 34A-6-1.4 to 34A-6-1.13 (solid waste disposal facilities must obtain permits); and SDCL 34A-6-53 to 34A-6-56 (solid waste disposal facilities handling in excess of 200,000 tons of waste annually must get legislative approval for their operations).
>
> At the time of the Referendum in November 1992, SDDS's one-year permit had expired. In any event, that one-year permit was void because the [Board], in issuing the permit, failed to make specific findings of fact that the Lonetree facility was in the public interest and that the facility met five specified environmental prerequisites.
>
> Although the [Board] had issued SDDS a five-year renewal permit and the Legislature had passed S.B. 169 approving the operation of the Lonetree facility, the five-year permit was invalid because it was based upon an invalid one-year permit. The five-year renewal permit was void ab initio. In other words, SDDS has never had a valid permit to operate the Lonetree facility. Without a valid permit, SDDS has no constitutionally protected property interest in operating the facility. Both of SDDS's due process claims fail.
>
> The Court notes that SDDS's remaining commerce clause and equal protection claims rest solely on the effect of the Referendum, the validity of the Initiated Measure having already been decided by [the South Dakota state court]. Furthermore, because SDDS has never had a valid permit to operate its Lonetree facility, S.B. 169 and the subsequent Referendum "vetoing" that bill have no practical effect. By the very unambiguous terms of the Initiated Measure, legislative approval may only be

> granted to a facility that is operational "pursuant to solid waste permit." SDCL 34A-6-53. SDDS has never had a valid permit. The legislature cannot have granted approval of the Lonetree facility if the facility had no permit to operate. It logically follows that if the legislature was not in a position to grant approval to the Lonetree facility, then the enabling legislation (S.B.169) was of no effect. The Referendum would also be of no effect. If the Referendum had no effect, the commerce clause and the equal protection clause are not implicated.

SDDS V, 843 F. Supp. at 553-54 (citations and notations omitted).

The Defendants, in their brief to this Court in *SDDS VI*, argued strenuously that we affirm these holdings. See Appellee's Br. in No. 94-1688, at 10-17, 41, reprinted in part in I Appellant's App. at Tab 2[10]. SDDS, of course, strongly urged

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[10] For example, the Defendants previously argued that South Dakota's laws regulating solid waste facilities have changed since SDDS obtained its original 1989 permit. South Dakota's solid waste regulations were entirely rewritten in July of 1990, and have been amended once before the November 1992 Referendum and once after. Appellee's Appendix G. Since the September 1991 findings issued by the Board were based on the original 1989 record, the September 1991 findings do not address or consider these regulatory changes. The Board must determine compliance with these new regulatory requirements before a solid waste permit can issue; this determination was never made and SDDS is therefore not entitled to a permit. Appellee's Br. in No. 94-1688, at 14-15, reprinted in I Appellant's App. at Tab 2. See also *id.* at 41 ("More importantly the Referendum's disapproval of Senate Bill 169 did not impact SDDS's ability to accept out of state waste because SDDS could not accept any waste, regardless of the source, until it obtained new state solid waste permits." (emphasis in original)).

that we reverse the district court on these points. See Appellant's Reply Br. in No. 94-1688, at 2-10, reprinted in I Appellant's App. at Tab 3.[11/]

In *SDDS VI*, we reversed the district court's judgment. See 47 F.3d at 272. In so doing, we explicitly accepted SDDS's arguments on both of these contested issues, and we explicitly rejected the Defendants' positions. Regarding the protected property interest in operating the MSWD, we stated:

> In 1991, S.D. Codified Laws § 34A-6-1.13 was amended and the implementing regulations were rewritten.Although the ultimate question of whether the facility was environmentally safe and in the public interest remained the same, several factors weighing into the agency's decision changed. On remand after *SDDS I*, the agency made the specific findings required by its revised regulations. The agency found the Lonetree facility to be environmentally safe, using language that parallels the applicable regulation.Appellant's App. at 117 (Finding # 52, paralleling S.D. Admin.R. 74:27:17:01). The agency found the facility to be in the public interest. Appellant's

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[11] For example, SDDS previously argued that the procedural defect in the [Board's] original decision — the lack of findings that resulted in the remand in *SDDS I* — had been cured by the time of the Referendum.... [O]n remand the [Board] entered extensive findings responsive to the [South Dakota] Supreme Court's mandate and concluded that SDDS had met "all requirements" for the issuance of a solid waste permit under the relevant laws and regulations of South Dakota.

Appellant's Reply Br. in No. 94-1688, at 7, reprinted in Appellant's App. at Tab 3 (note omitted). See also *id.* at 3 ("[t]he State attempts to avoid the consequence of its admission concerning the Referendum's 'practical effect,' by engaging in an inventive but, unfortunately, distorted analysis of the state court litigation").

> App. at 121 (Finding # 72). Both findings were preceded by numerous supporting factual findings. The revised [Board] findings also contain a specific legal conclusion that all requirements for the permit had been met. Appellant's App. at 122 (Conclusions of law # 3 & # 4).

SDDS VI, 47 F.3d at 265 n.5 (emphasis added)[12]. This determination that all of the factual predicates and legal requirements for SDDS's permit had been met was necessarily dispositive of SDDS's property interest in the permit itself. See *Littlefield* v. *City of Afton*, 785 F.2d 596, 602 (8th Cir. 1986) ("We hold that appellants have a property interest in the building permit because they complied with all the legal requirements contained in the ordinances of the City of Afton.Appellants need not comply with illegal conditions in order to have a property interest in the permit." (emphasis in original)), *holding limited in part on other grounds*, *Lemke* v. *Cass County, Neb.*, 846 F.2d 469, 470-71 (8th Cir. 1987) (per curiam) (en banc) (holding that "[w]hether a substantive due process claim may arise from a denial of a zoning permit is an open question in this circuit and need not be decided in this case").[13]

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[12] We note that these factual determinations by an administrative agency must be given "great weight" by South Dakota courts. See SDCL 1-26-36.

[13] In adopting the factual findings of the Board in *SDDS VI*, we did not then — and need not now — address the issue of whether those findings were entitled to claim preclusive effect. See *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 109-10, 111 S. Ct. 2166, 2170, 115 L.Ed.2d 96 (1991) ("Although administrative estoppel is favored as a matter of general policy, its suitability may vary according to the specific context of the rights at stake, the power of the agency, and the relative adequacy of agency procedures."). Put bluntly, here we are not concerned with determining the accuracy of our

Regarding the effect of the referendum on SDDS, we stated in *SDDS VI* that:

> Despite the fact that it has previously conceded that "[t]he practical effect of the referendum was to prohibit the construction" of the Lonetree facility, Appellant's App. at 39, South Dakota now argues that because the [Board] permit had been revoked, the referendum had no impact, discriminatory or otherwise, on Lonetree. However, if this court were to ignore South Dakota's intermediary actions and look only to the result, it would reward South Dakota for acting unconstitutionally. Moreover, the administrative permit was voided due to a procedural defect, not because of any finding that the Lonetree facility was environmentally dangerous. Thus, Lonetree could reapply for the administrative permit, and the referendum at the very least made the Lonetree project more difficult and expensive to accomplish.

Id. at 270 n.10 (citations and quotations omitted).[14]

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decision in *SDDS VI*, but rather in insuring its effectiveness. See, *e.g.*, *Moe* v. *Moe*, 496 N.W.2d 593, 595 (S.D.1993) (res judicata applies "whether the court was correct at the time or not"). If the Defendants were dissatisfied with our adjudication of their case in *SDDS VI*, their options were to request rehearing by this Court en banc or to petition the United States Supreme Court for a writ of certiorari. They may not, however, collaterally challenge our decisions in the South Dakota state courts. See *City of Tacoma*, 357 U.S. at 334, 78 S. Ct. at 1217-18.

[14] Indeed, our ruling echoed that of the South Dakota Supreme Court in *SDDS IV*, 507 N.W.2d at 703, which found that the referendum "placed Senate Bill 169 in limbo and shut down the [Lonetree] facility pending the outcome of the general election." See also *SDDS III*, 994 F.2d at 489 ("S.B. 169 was, therefore, effectively vetoed by the citizens of South Dakota

The issues which the Defendants now wish to relitigate in the state courts were, therefore, actually and finally decided by this Court in *SDDS VI*. Under South Dakota's rules of claim preclusion or collateral estoppel, we conclude that this Court's decision in *SDDS VI* bars the Defendants from relitigating these settled issues in subsequent litigation in the state courts. See, *e.g.*, *Moe* v. *Moe*, 496 N.W.2d 593, 595 (S.D.1993):

> [I]f the prior final judgment or order had been rendered by a court of competent jurisdiction, it is conclusive as to all rights, questions, or facts directly involved and actually, or by necessary implication, determined therein, whether the court was correct at the time or not.
>
> We apply four factors to determine whether the doctrine of [claim preclusion] bars this appeal: (1) whether the issue decided in the former adjudication is identical with the present issue; (2) whether there was a final judgment on the merits; (3) whether the parties are identical; and (4) whether there was a full and fair opportunity to litigate the issues in the prior adjudication.

(citations and quotations omitted). See also *Black Hills Novelty Co.* v. *South Dakota Comm'n*, 520 N.W.2d 70, 73 (S.D.1994) (describing elements of collateral estoppel). In this case, all of these elements have unquestionably been met: the issues are the same, the parties are the same, there was a final judgment on the merits in *SDDS VI*, and the record amply reveals that the Defendants were not only given, but took every opportunity, to fully and fairly litigate these issues before us. Because the Defendants are barred by claim preclusion from relitigating the issues of (1) whether SDDS had a legitimate claim of entitlement to a permit to operate an MSWD, and (2) whether the referendum was the proximate cause of SDDS's dissolution, the relitigation exception to the Anti-Injunction Act permits

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and the Lonetree project has been unable to proceed since.").

injunctive relief to prevent them from so relitigating these issues in the South Dakota state courts.[15]

V.

We recognize, however, that "[t]he fact that an injunction may issue under the Anti-Injunction Act does not mean that it must issue. The injunction must be an otherwise proper exercise of the [court's] equitable power." *Daewoo Elecs.* v. *Western Auto Supply Co.*, 975 F.2d 474, 478 (8th Cir. 1992). We review the district court's denial of injunctive relief for abuse of discretion.See *Goff* v. *Harper*, 60 F.3d 518, 520 (8th Cir. 1995). "Abuse of discretion occurs if the district court rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions." *Hosna* v. *Groose*, 80 F.3d 298, 303 (8th Cir.) (quotations and citations omitted), *cert. denied*, 519 U.S. 860, 117 S. Ct. 164,

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[15] Under the Full Faith and Credit Act, 28 U.S.C. § 1738, we are bound by a state court's application of its res judicata rules to our judgments. See *Parsons Steel, Inc.* v. *First Ala. Bank*, 474 U.S. 518, 524, 106 S. Ct. 768, 772, 88 L.Ed.2d 877 (1986):

> We believe that the Anti-Injunction Act and the Full Faith and Credit Act can be construed consistently, simply by limiting the relitigation exception of the Anti-Injunction Act to those situations in which the state court has not yet ruled on the merits of the res judicata issue. Once the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision.

Because the South Dakota trial court did not rule on the claim preclusive effect of *SDDS VI*, see *SDDS VII*, Mem. Op. at 2 n.3, 5, 20-21, we are not precluded from protecting our judgment in *SDDS VI* under the relitigation exception to the Anti-Injunction Act. See *Daewoo Elecs.* v. *Western Auto Supply Co.*, 975 F.2d 474, 479 (8th Cir. 1992).

136L.Ed.2d 107(1996). See also *Walser* v. *Toyota Motor Sales, U.S.A., Inc.*, 43 F.3d 396, 401 (8th Cir. 1994) ("We will not disturb a district court's discretionary decision if that decision remains within the range of choice available to the district court, accounts for all relevant factors, does not rely on any irrelevant factors, and does not constitute a clear error of judgment." (quotations and citations omitted)).

In analyzing SDDS's motion for injunctive relief, the district court stated that:

> Essentially, SDDS's claim for injunctive relief seeks to have this Court enjoin a proceeding before the South Dakota Supreme Court. This Court declines to take such action.

SDDS, Inc. v. *State of S.D.*, Civil No. 91-5121 (D.S.D. May 28, 1996), reprinted in I Appellant's App. at Tab 12. While this description overstates the degree of relief requested by SDDS — which sought to enjoin the relitigation of specific issues, rather than a blanket injunction of all consideration of its dispute with the Defendants by the South Dakota Supreme Court — it does represent a proper concern by the district court for a core element of federalism, embodied by the Anti-Injunction Act, that the federal courts should not interfere with the state courts' operation. See, *e.g.*, *Southwest Airlines Co.* v. *Texas Int'l Airlines*, 546 F.2d 84, 91 (5th Cir. 1977) ("few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies" (analyzing abstention doctrine and Anti-Injunction Act) (quoting *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496, 500, 61 S. Ct. 643, 645, 85 L.Ed. 971 (1941))), *cert. denied*, 434 U.S. 832, 98 S. Ct. 117, 54 L.Ed.2d 93 (1977); but see *United States* v. *Rural Elec. Convenience Co-Op. Co.*, 922 F.2d 429, 439 (7th Cir. 1991) ("we do not believe that comity and federalism should be considered 'public interest' factors that militate against the issuance of an injunction").

The district court's analysis fails, however, to consider the factors which support the issuance of injunctive relief in this case. In *Dataphase Sys., Inc.* v. *C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc), this Court held that:

> Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Applying the *Dataphase* factors to the case before us, we conclude that the district court abused its discretion in denying injunctive relief. Requiring SDDS to relitigate in the state court issues previously decided by this Court constitutes an irreparable harm. See, e.g., *Daewoo*, 975 F.2d at 478 (affirming district court's finding that petitioner "would suffer irreparable harm if injunctive relief were not issued because it would face relitigation of claims already adjudicated in its favor").[16/]

Goodrich v. *Supreme Court of S.D.*, 511 F.2d 316, 317 (8th Cir. 1975) (refusing to enjoin state court disbarment proceeding (citing *Younger* v. *Harris*, 401 U.S. 37, 46, 91 S. Ct. 746, 751, 27 L.Ed.2d 669 (1971))). Where a petitioner seeks to enjoin a state court's civil proceeding, however, we have only required a showing of "irreparable harm" to allow a grant of injunctive relief. See *Daewoo*, 975 F.2d at 478 (analyzing *Goodrich*).

While issuing the injunction in this case will foreclose the opportunity for the Defendants to relitigate issues in the state court, we do not believe that this is a legitimate harm which must be balanced. As noted above, the Defendants had one full

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[16] A petitioner seeking to enjoin a criminal or quasi-criminal state court proceeding must demonstrate a threat of "great and immediate irreparable injury that cannot be eliminated by his defense to the state proceeding."

and fair opportunity to litigate these issues in the federal forum, and the rules of equity do not require that they be given a second bite at the apple in the state forum in order to obtain a more favorable result. See, e.g., *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299, 37 S. Ct. 506, 508, 61 L.Ed. 1148 (1917) ("This doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect." (quotations and citation omitted)).

The third and fourth Dataphase elements also support issuance of an injunction in this case. As discussed above, SDDS successfully litigated in *SDDS VI* the issues currently contested by the Defendants; SDDS's success on the merits of the underlying issue is therefore already secured. In addition, the public policy concerns of finality and repose informing our res judicata jurisprudence strongly supports the protection of our previous judgment. While the interference with a state court proceeding is generally opposed by public policy, this "injunction will promote judicial economy and protection of parties from harassing, duplicative litigation, interests which the federal and state courts share." *Daewoo*, 975 F.2d at 479 (citation omitted).

We find no merit in the Defendants' remaining arguments opposing the granting of injunctive relief. We therefore reverse the district court's denial of injunctive relief in this case, and remand to the district court for an order enjoining the Defendants from relitigating in the South Dakota state courts the issues of (1) whether SDDS had a legitimate claim of entitlement to a permit to operate an MSWD, and (2) whether the referendum was the proximate cause of SDDS's dissolution.

United States Court of Appeals,
Eighth Circuit.

SDDS, INC., a South Dakota
Corporation, Appellant,

v.

STATE OF SOUTH DAKOTA; Mark W. Barnett,
Attorney General of the State of South
Dakota; Walter D. Miller, as Governor of the
State of South Dakota; Joyce Hazeltine,
Secretary of State of the State of South
Dakota, Appellees,

Action for the Environment, Intervenor Below.

No. 94-1688.

Submitted Nov. 15, 1994.
Decided Feb. 6, 1995.

Before MAGILL, Circuit Judge, JOHN R. GIBSON, Senior Circuit Judge, and BEAM, Circuit Judge.

MAGILL, Circuit Judge.

South Dakota Disposal Systems, Inc., (SDDS) appeals the district court's grant of summary judgment to the defendants, the State of South Dakota and various state officials (collectively, "South Dakota"), and its denial of SDDS's cross-motion for summary judgment. At issue in this § 1983 suit is whether the referendum of a measure permitting SDDS to operate a large-scale municipal solid waste disposal (MSWD) facility in South Dakota violates the dormant commerce clause or SDDS's rights to due process and equal protection.Because we find that the referendum was the latest in a series of protectionist roadblocks erected by South Dakota,

we hold that the referendum violates the dormant commerce clause. Accordingly, we reverse.[1]

I. BACKGROUND

This appeal is the latest in a seemingly never-ending series of cases arising from SDDS's six-year-long struggle to develop a large-scale MSWD facility near Edgemont, South Dakota. In November 1988, SDDS filed with the South Dakota Department of Water and Natural Resources (DWNR)[2] an application for a permit to site, construct and operate a MSWD facility (the Lonetree facility). At the time, South Dakota's administrative permitting procedure for SWD facilities was to issue a one-year initial permit if the facility was determined to be environmentally safe and in the public interest, then to issue five-year renewals of that permit after de novo review of the safety of the facility. See S.D.Codified Laws § 34A-6-1.16 (1986 & Supp.1989). After much judicial[3] and political[4] wrangling, the Board of Minerals and the Environment (BME),

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1 We express no view as to the merits of the due process or equal protection claims brought by SDDS.

2 The Department has since changed its name to the Department of Environment and Natural Resources. We will use the old name throughout this opinion in the hope that it may, in some small way, simplify this appeal.

3 The DWNR failed to act upon the application within 120 days, as required by S.D.Admin.R. 74:27:04:05(2). SDDS sued, and in *SDDS, Inc.* v. *South Dakota Dep't of Water & Natural Resources*, Civ. Case No. 18-179 (S.D. 6th Cir. Ct. July 5, 1989), the DWNR was ordered to act upon the application.

4 After it was forced to act, the DWNR initially recommended that the application be approved. South Dakota Governor Mickelson intervened and caused the DWNR to reverse its position, resulting in a referral to the BME.

a branch of the DWNR, held a hearing on whether SDDS's application should be granted. The BME determined that the Lonetree facility was environmentally safe and in the public interest, as required by S.D.Codified Laws § 34A-6-1.13 (1986 & Supp. 1989), and issued the initial one-year permit on September 9, 1989. While the one-year permit was in effect, SDDS applied for a five-year renewal permit. The BME conducted additional hearings and issued the renewal permit in December 1990 based on independent findings that the Lonetree facility was safe and in the public interest.

SDDS's two permits have generated much litigation.In *In re Application of SDDS, Inc., for a Solid Waste Permit*, 472 N.W.2d 502 (S.D.1991) (*SDDS I*), the South Dakota Supreme Court held that when the BME issued the original one-year permit, it did not make sufficient factual findings from which the court could determine whether the Lonetree facility was in the public interest. The court remanded for factual findings,[5] but did not address the merits of whether the facility was in fact in the public interest. 472 N.W.2d at 512. In *In re 1990*

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[5] In 1991, S.D.Codified Laws § 34A-6-1.13 was amended and the implementing regulations were rewritten.Although the ultimate question of whether the facility was environmentally safe and in the public interest remained the same, several factors weighing into the agency's decision changed. On remand after *SDDS I*, the agency made the specific findings required by its revised regulations. The agency found the Lonetree facility to be environmentally safe, using language that parallels the applicable regulation.Appellant's App. at 117 (Finding # 52, parallelling S.D.Admin.R. 74:27:17:01). The agency found the facility to be in the public interest. Appellant's App. at 121 (Finding # 72). Both findings were preceded by numerous supporting factual findings. The revised BME findings also contain a specific legal conclusion that all requirements for the permit had been met. Appellant's App. at 122 (Conclusions of law # 3 & # 4).

Renewal Application of SDDS, Inc., 507 N.W.2d 702 (S.D.1993) (*SDDS IV*), the South Dakota Supreme Court held that the renewal permit was void from its inception because the original one-year permit was found invalid in *SDDS I*. *SDDS IV*, 507 N.W.2d at 703-04.

Meanwhile, South Dakota voters addressed SDDS's attempt to develop the Lonetree facility by placing an initiative on the November 1990 ballot. This initiative required legislative approval of any large-scale SWD facility in addition to the administrative approval required of all SWD facilities regardless of size. Legislative approval was conditioned upon a finding that the facility was environmentally safe and in the public interest. Under South Dakota law, the Secretary of State is required to publish a pamphlet containing an Attorney General's explanation of, S.D.Codified Laws § 12-13-9 (1982 & Supp.1994), and public comment on, S.D. Codified Laws § 12-13-23 (1982 & Supp.1994), each initiated or referred measure. South Dakota stated at oral argument that this pamphlet is part of the legislative history of these initiated and referred measures. The Attorney General's explanation of the November 1990 initiative stated that it would apply retroactively to existing facilities (*i.e.*, the Lonetree facility), and that only one facility (*i.e.*, the Lonetree facility) would be affected. The initiative was passed in the November 1990 election, and is codified at S.D.Codified Laws § 34A-6-53 to 56 (1992).

Shortly after the initiative was passed, the South Dakota legislature passed, and the governor signed, 1991 S.B. 169, codified at S.D. Codified Laws § 34A- 6-57 (1992), which gave the required legislative approval to the Lonetree facility. A referendum on S.B. 169 was certified on May 8, 1991. The Attorney General prepared an explanation of S.B. 169 and published arguments pro and con.The Attorney General's explanation states that the legislature found the facility to be environmentally safe and in the public interest and that the DWNR permits were "declared invalid in a court decision."

The three- sentence "pro" statement mentions public support for the facility in the Edgemont area, the issuance of permits by the DWNR and the legislature, and the economic impact of the facility.

The "con" statement is the most significant part of the explanatory pamphlet in terms of length and impact. Because of the importance of this statement, we set it out at length:

> Referred Law # 1 is a direct public vote on the Lonetree mega-garbage dump near Edgemont. South Dakota Disposal Systems, Inc. (SDDS), Lonetree's owner, has stated 95% of the waste will come from out-of-state. The Board of Minerals and Environment and the legislature gave SDDS approval to bring in 65 railroad cars of garbage per day, seven days per week.
>
> ACTion for the Environment has referred that approval to a vote because South Dakota is not the nation's dumping grounds. A "NO" vote will prevent Lonetree from operating, and keep its imported garbage out of South Dakota.
>
> The U.S. Environmental Protection Agency has stated that all landfills eventually deteriorate, and new technologies only delay leaks further into the future (Federal Register, August 30, 1988). NIMBY (not in my backyard) exists because people do not want their soil, air and water contaminated.
>
> ....
>
> ... Lonetree is not an option for South Dakota communities. It is an out-of-state dump.
>
> To the extent we become the nation's dumping grounds, we undermine successful recycling efforts elsewhere. Vote "NO" on Lonetree.

Appellant's Add. at 38. In November 1992, the referred measure was defeated, effectively vetoing the Lonetree

facility[6]. *SDDS, Inc.* v. *South Dakota*, 994 F.2d 486, 489 (8th Cir. 1993) (*SDDS V*).

These legislative activities spawned several additional lawsuits. SDDS challenged the initiative that required dual legislative and administrative approval. In *SDDS, Inc.* v. *State*, Civ. Case No. 90-412 (S.D. 6th Cir. Ct. Oct. 31, 1991) (*SDDS III*), South Dakota state judge Steven L. Zinter upheld the initiative against several attacks virtually identical to those now mounted against the referendum. Judge Zinter's decision in *SDDS III* was not appealed.

All these events bring us to the procedural history of this case in the federal courts. This appeal is the second time we have encountered the referendum. In *SDDS V*, we reversed the district court's grant of summary judgment for South Dakota and remanded the case for further proceedings. The issue resolved in *SDDS V* was whether Judge Zinter's decision concerning the legality of the initiative (*SDDS III*) precluded litigation of the legality of the referendum (*SDDS V*) under the doctrine of collateral estoppel. We held that it did not. On remand, the district court granted summary judgment for South Dakota a second time, holding that there was no due process violation because SDDS had no affected property interest, no commerce clause violation and no equal protection violation.843 F. Supp. 546, 562 (D.S.D.1994). SDDS's cross-motion for summary judgment was denied. This appeal followed.

II. DISCUSSION

A. The General Framework: Varying Levels of Scrutiny

The Supreme Court has established a two-step approach to the dormant commerce clause. The first step requires us to

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[6] S.B. 169 never had any effect because it would not become effective as law unless and until it passed the referendum. *SDDS, Inc.* v. *State*, 481 N.W.2d 270 (S.D.1992) (*SDDS II*).

determine whether a challenged state measure discriminates against out-of-state articles (*i.e.*, is a protectionist measure). Discrimination may take one of three forms. See *Chemical Waste Mgmt.* v. *Hunt*, 504 U.S. 334, ---- n.6, 112 S. Ct. 2009, 2015 n.6, 119 L.Ed.2d 121 (1992) (noting three types of discrimination); *Southern States Landfill* v. *Georgia DNR*, 801 F. Supp. 725, 730-31 (M.D.Ga.1992) (finding statute discriminatory on its face, in purpose and in effect); *Waste Recycling* v. *Southeast Ala. Solid Waste Disposal*, 814 F. Supp. 1566 (M.D. Ala. 1993), *affirmed*, 29 F.3d 641 (11th Cir. 1994). First, a measure may facially discriminate against out-of-state articles. See, *e.g.*, *Philadelphia* v. *New Jersey*, 437 U.S. 617, 98 S. Ct. 2531, 57 L.Ed.2d 475 (1978) (facial discrimination where state statute prohibited importation of waste "which originated or was collected outside the territorial limits of the State"); *Hughes* v. *Oklahoma*, 441 U.S. 322, 336-37, 99 S. Ct. 1727, 1736-37, 60 L.Ed.2d 250 (1979) (facial discrimination where state statute provided that no one "may ship or transport minnows for sale into this state from an outside source"); *In re Southeast Ark. Landfill, Inc.*, 981 F.2d 372, 373 (8th Cir. 1992) (facial discrimination where state statute divided state into eight districts and restricted receipt of waste originating "outside of the District in which [a landfill] is located"); *Waste Sys. Corp.* v. *County of Martin, Minn.*, 985 F.2d 1381, 1386 (8th Cir. 1993) (facial discrimination where ordinance required disposal of MSW generated within county at in-county disposal facility). No one contends that the referendum is facially discriminatory. However, facial discrimination is merely one of the ways in which a state may "artlessly disclose an avowed purpose to discriminate." *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354, 71 S. Ct. 295, 298, 95 L.Ed. 329 (1951).

The other two forms of discrimination are more subtle and require us to examine the overall effect of the challenged

measures[7]. *Waste Sys. Corp.*, 985 F.2d at 1386. A second way in which a challenged measure may discriminate is that a facially neutral measure may have a discriminatory purpose. See, *e.g.*, *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53, 97 S. Ct. 2434, 2446-47, 53 L.Ed.2d 383 (1977) (discriminatory purpose where facially neutral state statute prohibiting state grading from appearing on apple boxes discriminated against Washington apples that carry state grades). Third, a facially neutral measure may have a discriminatory effect. See, e.g., *Maine* v. *Taylor*, 477 U.S. 131, 148 n.19, 106 S. Ct. 2440, 2453 n.19, 91 L.Ed.2d 110 (1986) (discriminatory effect may be found where state "respond[s] to legitimate local concerns by discriminating arbitrarily against interstate trade"); *GSW, Inc.* v. *Long County, Ga.*, 999 F.2d 1508, 1517 (11th Cir. 1993) (discriminatory effect where county imposed 150-mile restriction on origin of waste); *Government Suppliers Consol. Serv.* v. *Bayh*, 975 F.2d 1267, 1278-79 (7th Cir. 1992) (discriminatory effect where state statute imposed "backhaul ban" and additional registration and stickering requirements), *cert. denied*, 506 U.S. 1053, 113 S. Ct. 977, 122 L.Ed.2d 131 (1993).

At the second step of the analysis, we apply the appropriate level of scrutiny. The Supreme Court has established two levels of scrutiny. The determinative factor is the presence or absence of discrimination against interstate commerce. If the state measure is discriminatory, it is subjected to the "strictest scrutiny," *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality of the State of Oregon*, 511 U.S. 93, ----, 114 S. Ct. 1345, 1351, 128 L.Ed.2d 13 (1994) (quoting *Hughes*, 441 U.S. at 337, 99 S. Ct. at 1736-37), and a "virtually per se rule of

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[7] "[T]he evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia*, 437 U.S. at 626, 98 S. Ct. at 2536-37. Facial discrimination generally involves a discriminatory purpose and a discriminatory effect, while the other two forms of discrimination involve one or the other.

invalidity" applies. *Oregon Waste Sys.*, 511 U.S. at ----, 114 S. Ct. at 1351 (quoting *Philadelphia*, 437 U.S. at 624, 98 S. Ct. at 2535-36); *Landfill*, 981 F.2d at 375.Southeast Ark[8]. If "other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade," the measure is subjected to a more flexible balancing test. *Pike* v. *Bruce Church*, 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L.Ed.2d 174 (1970); Philadelphia, 437 U.S. at 624, 98 S. Ct. at 2535-36; *Waste Sys. Corp.*, 985 F.2d at 1385-86; *Southeast Ark. Landfill*, 981 F.2d at 375. We address each of these two steps in turn.

B. What Level of Scrutiny: Is there discrimination?

Although the referendum is not facially discriminatory, we find that the referendum was certified and that the referred measure was defeated for a discriminatory purpose. We also find that the referendum has a discriminatory effect against interstate commerce. We therefore apply the "strictest scrutiny" to the referendum.

1. Does the referendum have a discriminatory purpose?

The presence of a discriminatory purpose is one of three ways to trigger strict scrutiny. *Hunt*, 432 U.S. at 352-53, 97

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[8] We (and numerous other courts) have previously stated that Philadelphia establishes a "*per se* rule of invalidity." *Waste Sys. Corp.*, 985 F.2d at 1387. Although this statement may be inaccurate in a technical sense (the full quotation from Philadelphia is "a virtually *per se* rule of invalidity"), it accurately states the results of cases in which strict scrutiny is applied. The only way that discriminatory state action can withstand this level of scrutiny is if the state demonstrates that the out-of-state articles are more dangerous than are in-state articles. *Chemical Waste Mgmt.*, 504 U.S. at ---- - ----, 112 S. Ct. at 2014-15 (applying principle to waste); *Taylor*, 477 U.S. at 131, 106 S. Ct. at 2440-43. Neither party to this appeal makes any such claim.

S. Ct. at 2446-47; *Chemical Waste Mgmt.*, 504 U.S. at ---- n.6, 112 S. Ct. at 2015 n.6; *Waste Sys. Corp.*, 985 F.2d at 1381. The record is replete with direct and indirect evidence of an avowed discriminatory purpose behind the referendum.

The record contains two pieces of direct evidence of a discriminatory purpose. First, in *SDDS III*, Judge Zinter noted that the initiative "was purposely drafted to insure that, except for Lonetree, the Initiated Measure would not apply to existing or foreseeable future landfills that dispose of South Dakota waste." Appellant's App. at 184. The dual administrative and legislative approval required by the initiative was specifically designed and intended to hinder the importation of out-of-state waste into South Dakota. The purpose of the first and only referendum under the initiative cannot be divorced from the purpose of the initiative itself. The initiative was drafted to defeat a specific "out-of-state dump" by requiring an additional approval, and the referendum concerns that very approval for the same "out-of- state dump." We believe that the discriminatory purpose behind the initiative infected the referendum as well. Second, the legislative history of the referred measure is brimming with protectionist rhetoric. The state-sponsored pamphlet that accompanied the referendum contained a "con" statement that exhorted voters to vote against the "out-of-state dump" because "South Dakota is not the nation's dumping grounds," and "[a] 'NO' vote will prevent Lonetree from operating, and keep its imported garbage out of South Dakota." This is ample evidence of a discriminatory purpose to trigger strict scrutiny.

In addition to this direct evidence of a discriminatory purpose, there is substantial indirect evidence that the referendum was motivated by a discriminatory purpose. In Hunt, the Supreme Court found "it somewhat suspect" that the means used to achieve the state's "ostensible ... purpose" were relatively ineffective. *Hunt*, 432 U.S. at 352, 97 S. Ct. at 2446. Likewise, South Dakota has employed a highly ineffective means to pursue its ostensible purpose of environmental

protection.After the initiative passed, a large-scale MSWD facility in South Dakota was required to obtain two things: an administrative permit and legislative authorization.South Dakota argues that large MSWD facilities generally pose a greater risk to the environment than do smaller facilities. We will assume for the sake of our decision that this is true. However, although the general difference in risk between larger and smaller facilities justifies a general requirement of legislative approval for large MSWD facilities, a general difference in risk, without more, is insufficient to support a particular denial of legislative approval. South Dakota must demonstrate not only that there are legitimate interests justifying the general requirement of dual approval, but it must also show that this particular review furthered those goals. Although *SDDS III* establishes that requiring both administrative and legislative approval for large facilities is permissible because the difference in risk between large and small facilities is a legitimate state interest, South Dakota has completely failed to demonstrate that the referendum that denied legislative approval for the Lonetree facility in any way furthered the state's legitimate concerns with safety and environmental protection.

South Dakota's most significant environmental protection device is the administrative permitting process for SWD facilities. Anyone who sites, develops or operates a SWD facility in South Dakota must obtain a permit from the DWNR. S.D.Codified Laws § 34A-6-1.4 (1992). SDDS sought a permit for the Lonetree facility from the DWNR, and when the permit was contested, the BME held hearings to determine whether the Lonetree facility was environmentally safe and in the public interest. The permit was granted, appealed, remanded, reissued, reappealed, renewed, and ultimately voided. The fact that SDDS's permit for the Lonetree facility was so carefully scrutinized indicates that the administrative permitting process is a relatively effective means of environmental protection.In fact, South Dakota admits that the Lonetree facility is safe and

in the public interest if operated in accordance with the DWNR permit conditions. Appellant's App. at 165. Thus, the benefit of the added requirement of legislative approval is not that the legislature provides the sole means by which South Dakota protects its environment from potentially unsafe SWD facilities. Rather, the legislative approval provides a second opportunity to review the proposed facility. Thus, the dual process provides an incremental benefit over the administrative process alone to the extent that the legislature is able to detect unsafe facilities that are not detected by the DWNR.

Because the benefit of legislative review is that it screens out unsafe large facilities that survived the administrative review process, the benefit of each legislative review is directly proportional to the amount of scrutiny of the environmental effects of the proposed facility that occurs in that review[9]. The challenged referendum cannot be said to have provided any benefits because the body that disapproved the Lonetree facility (*i.e.*, the South Dakota electorate) was provided with: (1) no standards or information to use to evaluate the benefits and risks of the Lonetree facility; and (2) information that leads to an unreliable result. South Dakota has admitted that there were

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[9] Viewing the benefit in this manner distinguishes the dual permitting measure from the absolute bans on large landfills that have been approved in dicta. See, *e.g.*, *Southeast Ark. Landfill*, 981 F.2d at 376; *Fort Gratiot Landfill* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353, ----, 112 S. Ct. 2019, 2027, 119 L.Ed.2d 139 (1992). An absolute ban is analogous to a permissible quarantine law. There is a legitimate state interest in environmental protection, and the absolute ban is the best, or at least a permissible, way to achieve this goal. South Dakota's legislative review process, by contrast, although supported by the same state interest in the abstract, simply does nothing to further this purported goal. Thus, the fact that legislative review is less restrictive than an absolute ban, rather than being an asset, proves fatal.

no standards to guide the electorate. Appellant's App. at 166. Indeed, in *SDDS III*, Judge Zinter noted that the referral was a "standardless review by the electorate." Appellant's App. at 207 n.9. The voters simply voted yes or no without any criteria and with severely limited information to guide them in evaluating the effects of the Lonetree facility. Thus, because the voters were not provided with any meaningful criteria, the defeat of the referred measure cannot be seen as improving environmental protection.

Additionally, voters were bombarded with protectionist propaganda that renders the result of the referendum unreliable as an environmental review. The legislative history of the referred measure consists largely of the state-sponsored explanatory pamphlet that contains an official explanation and arguments pro and con.Since the referred measure was defeated, the "con" statement is the most important. See *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 680, 101 S. Ct. 1309, 1321, 67 L.Ed.2d 580 (1981) (Justices Brennan and Marshall, concurring in judgment) (noting that dispositive issue is lawmakers' assessment of benefits and burdens). The con statement mentions general findings by the EPA that all landfills eventually degenerate, and also mentions recycling and the potential for hazardous waste dumping. However, no connection is made between these vague and general statements and the Lonetree facility.

Moreover, the few specific environmental concerns that are mentioned in the middle four paragraphs are sandwiched between five paragraphs containing pleas to reject "imported garbage" and the "out-of-state dump." This protectionist concern clearly emerges as the dominant reason to reject the referred measure. The opposition begins and ends its presentation with a plea to keep South Dakota from becoming the nation's dumping grounds. Such propaganda does nothing to enhance any meaningful review of the environmental impact; it merely allows protectionism to run rampant.

South Dakota purports to seek a second review of large-scale SWD facilities that pose increased environmental risks in order to protect its natural resources, but this particular review consisted of a referendum steeped in inflammatory propaganda and does virtually nothing to further this purported goal. This indirect evidence strengthens the conclusion that the denial of approval had a discriminatory purpose, and confirms our decision that the referendum must receive strict scrutiny.

2. Does the referendum have a discriminatory effect?

Alternatively, even if South Dakota had not openly declared a discriminatory purpose, the referendum is discriminatory in its effect, and this type of discrimination will also trigger strict scrutiny[10]. *Hughes*, 441 U.S. at 336, 99 S. Ct. at 1736; *Hunt*, 432 U.S. at 352-53, 97 S. Ct. at 2446- 47. *Hunt* applied strict scrutiny to a facially neutral statute in a situation that is analogous to the referral of S.B. 169. In *Hunt*, North

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[10] Despite the fact that it has previously conceded that "[t]he practical effect of the referendum was to prohibit the construction" of the Lonetree facility, Appellant's App. at 39, South Dakota now argues that because the BME permit had been revoked, the referendum had no impact, discriminatory or otherwise, on Lonetree. However, "[i]f this court were to ignore [South Dakota's] intermediary actions and look only to the result, it would reward [South Dakota] for acting unconstitutionally." *GSW, Inc.*, 999 F.2d at 1518. Moreover, the administrative permit was voided due to a procedural defect, not because of any finding that the Lonetree facility was environmentally dangerous. Thus, Lonetree could reapply for the administrative permit, and the referendum at the very least made the Lonetree project more difficult and expensive to accomplish. The absence of a reapplication to the BME is not fatal. See *Diamond Waste, Inc.* v. *Monroe County, Ga.*, 939 F.2d 941, 943 (11th Cir. 1991) (applying Pike test to invalidate county's disallowance of landfill, despite absence of application required by statute).

Carolina banned the placement of any grading (other than USDA grading) on closed shipping containers of apples. This measure affected only Washington state apples (which bore Washington state grades). Thus, in *Hunt*, out-of- staters were singled out to bear 100% of the cost of the measure. The structure of the "garbage market" in South Dakota is such that the referendum has a discriminatory effect. South Dakota generates 600,000 to 700,000 tons of MSW each year. In addition to this in-state waste, three facilities accept out-of-state waste (they accepted 60,000 tons in 1992). As a result of the low rate of domestic waste generation and the costs of regulation, the existing disposal facilities in South Dakota are fairly small; the largest facility disposes of 125,000 tons per year. New facilities must be large scale in order to recover the costs imposed by environmental regulations. The Lonetree facility was designed to accept 1.5 million tons of MSW per year. According to the literature accompanying the referendum, 95%[11] of this waste would originate outside South Dakota.

Hunt is analogous to this appeal because both involve a facially neutral measure that exports costs to out-of-staters[12].

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[11] *SDDS III* found that 90% of the waste would originate outside South Dakota. Slip op. at 3. SDDS makes similar claims.

[12] The fact that only 90% rather than 100% of the costs of excluding the waste fall on out-of-staters does not eliminate the discriminatory effect. This fact merely reduces the scope of the discrimination.*Fort Gratiot*, 504 U.S. at ----, 112 S. Ct. at 2025; *Waste Sys. Corp.*, 985 F.2d at 1387 n.11. The extent of the discrimination is not relevant to the prior determination whether the state has discriminated against interstate commerce. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 455-56, 112 S. Ct. 789, 801, 117 L.Ed.2d 1 (1992). In a similar vein, the fact that South Dakota later chose to permit importation of waste by

Hunt was a case where North Carolina sought to eliminate Washington's competitive advantages, so that North Carolina farmers could usurp part of the North Carolina apple market that belonged to Washington growers. Here South Dakota is attempting to exclude out-of-state trash that has a "negative" value, thus forcing other states to bear the cost of disposing of the trash when the market would otherwise dispose of the trash in South Dakota. Any distinction between these two species of protectionism is of no consequence. *Waste Sys. Corp.*, 985 F.2d at 1386. Indeed, Judge Zinter noted an analogy between the initiative and Hunt in *SDDS III*. Appellant's App. at 182. Moreover, we note that in *SDDS III*, Judge Zinter specifically found that the initiative had a discriminatory effect. Slip op. at 14-15. Just as the purpose of the initiative and the referendum are intimately connected, so are the effects. Thus, because the garbage market of South Dakota is such that the referendum so predominantly affects only out-of-staters, we believe that the referendum of S.B. 169 is discriminatory in effect, and must receive strict scrutiny.

C. Application of Strict Scrutiny

Once strict scrutiny is triggered, "the burden falls on the State to justify [the measure] both in terms of the local benefits flowing from the statute and the unavailability of a nondiscriminatory alternative adequate to preserve the local interests at stake." *Hunt*, 432 U.S. at 353, 97 S. Ct. at 2446-47; *Chemical Waste Mgmt.*, 504 U.S. at ----, 112 S. Ct. at 2014. We find that the referendum fails both prongs of this test because the record demonstrates that (1) the denial of

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the Big Stone plant goes only to the extent of the discrimination, not its existence. Moreover, because the issue is the referendum that was specific to Lonetree, it is questionable whether Big Stone has any relevance at all. To determine whether there was any discrimination, we must look to the effects on the garbage market as it existed at the time of the referendum.

legislative approval by the referendum does not further the legitimate goal of environmental safety, and therefore provides no local benefits; and (2) a nondiscriminatory alternative is available because legislative review of the Lonetree facility may be obtained without a referendum in which the predominant argument is the imported nature of the garbage at Lonetree.

In order to survive strict scrutiny under the commerce clause, South Dakota first must demonstrate that the referendum on the Lonetree facility provided some local benefits. South Dakota identifies environmental protection as the sought-after benefit. Although the goal of environmental protection is a permissible one, as we have already discussed, the referendum on S.B. 169 simply does nothing to advance this goal. Because there is already one procedure in place to protect the environment, and this second review provides only an incremental amount of additional protection, this referendum in which voters were distracted by distinctly non-environmental concerns provided no local benefit. South Dakota has not carried its burden to prove that this referendum resulted in increased environmental protection.

To survive strict scrutiny, South Dakota must also demonstrate the lack of a nondiscriminatory alternative to this referendum under the dual permitting scheme. Things such as a new administrative agency or more stringent regulations are possible alternatives, but these were rejected as alternatives to the initiative by the South Dakota state court in *SDDS III*. However, *SDDS III* addressed only the initiative. *SDDS V*, 994 F.2d at 493-94. We must look at alternative ways in which this particular decision regarding legislative approval might have been made. When the focus is changed from the broad focus of *SDDS III* to a narrower focus on this particular decision, nondiscriminatory alternatives emerge. The most obvious alternative is a legislative discussion in which interstate trade issues are not the dominant issues discussed. This alternative may be easily achieved through a fuller discussion of the

environmental issues, so that the record reflects that voters or legislators might reasonably have considered the environmental issues. Such an alternative, which merely modifies the contents of the legislative discussion or the voter pamphlet accompanying a referred measure, would not be any more costly than the current procedure. The alternative would more fully achieve the desired effect of protecting the environment by forcing consideration of the environmental issues without the distortions of reasoning that result from the emphasis on protectionist propaganda.

Thus, because we hold that the referendum provided no local benefit, and that a nondiscriminatory alternative was available, we conclude that the referendum fails the required strict scrutiny. We therefore hold that South Dakota's referendum of S.B. 169 violates the dormant aspects of the commerce clause of the United States Constitution.

III. CONCLUSION

We hold that South Dakota's referral of S.B. 169 violated the dormant commerce clause. Although facially neutral, the referendum had a discriminatory purpose and a sufficiently discriminatory effect to trigger strict scrutiny. Because we find that the referendum does not appreciably advance any legitimate local interest, and that nondiscriminatory alternatives are available to advance South Dakota's legitimate concerns, the referendum does not survive strict scrutiny. Accordingly, the judgment of the district court is reversed and we remand to the district court with instructions to enter judgment in favor of SDDS.

United States Court of Appeals,
Eighth Circuit.

SDDS, Inc., Appellee/Cross-appellant,

v.

State of South Dakota, Appellant/Cross-appellee.

Nos. 98-3588, 99-1034, 99-1035.

Order Denying Petition for
Rehearing and for Rehearing En Banc

November 9, 2000

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Chief Judge Wollman took no part in the consideration or decision of this matter.

(2)

Supreme Court, U.S.
FILED
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No. 00-1273

In The

Supreme Court of the United States

STATE OF SOUTH DAKOTA,

Petitioner,

v.

SDDS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTIONS PRESENTED

In three related decisions by the Court of Appeals for the Eighth Circuit decided in 1993, 1995, and 1996, it was determined (1) that a statewide referendum in South Dakota unconstitutionally prohibited the construction by the Respondent, SDDS, Inc. ("SDDS") of a large-scale interstate municipal solid waste disposal site, near Edgemont, South Dakota, and (2) that the State of South Dakota and named State officials were necessarily to be enjoined from relitigating in the state courts two specific issues that had been litigated and determined adversely to them in the federal litigation.

In the present case, the Petitioner, the State of South Dakota (the "State"), almost ten years after it expressly consented to appear in federal court to litigate the constitutionality of the referendum, and after having suffered three adverse judgments in the court of appeals, in which no claim of absolute Eleventh Amendment immunity was ever raised, is now attempting to assert such broad immunity, retroactively, by petitioning for review of the decision of the court of appeals which affirmed the district court's denial of the State's Fed.R.Civ.P. 60(b)(4) motion to vacate as void the judgments in the 1995 and 1996 cases.

QUESTIONS PRESENTED – Continued

Properly stated,[1] the questions thus presented are:

1. Whether the State is precluded from using Rule 60(b)(4) retroactively to challenge as void two final judgments of the court of appeals which were entered in cases in which the court possessed original jurisdiction, and in which the court expressly determined that the Eleventh Amendment did not bar its exercise of jurisdiction.

2. Whether the State, which in its answer to SDDS's § 1983 complaint, expressly admitted federal court jurisdiction and waived protection of the Eleventh Amendment as to the declaratory and prospective injunctive relief that was being sought against it, and then elected not to seek review by this Court of three final judgments entered against it by the court of appeals, should be deemed to have waived its Eleventh Amendment immunity.

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[1] The questions posed by the State are in the form of excessively circular arguments which assume the affirmative of what the petition seeks to prove and, in any event, as will appear below, they are more appropriately addressed in the reverse order of how they were stated.

PARTIES TO THE PROCEEDING

The Petition accurately identifies the parties.

Respondent SDDS, Inc., a South Dakota corporation, has neither a parent nor a subsidiary.

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STATEMENT OF THE CASE

An extended restatement of the case is necessitated both by the many inaccuracies and omissions in the Petitioner's[2] statement, as well as by the excessively argumentative style it employs. The State's effort to portray what occurred during the now nearly decade-long litigation in the federal courts below as entailing an "extraordinary departure" from the principles of the Eleventh Amendment is far from accurate. The State's statement of the case also omits to mention key facts whose disclosure changes the picture entirely.

The statement of the case offered by the State also employs a somewhat misleading characterization of the basis of the decision by the court of appeals as to which review is sought. A brief chronological history of what has occurred to this point, followed by a better understanding of the basis of the decision below, are therefore required in order to put the petition in proper perspective.

1. A Short History of the Litigation.

The State at first welcomed and encouraged SDDS's plan to develop a large rail-served municipal solid waste disposal site near Edgemont, in the arid and sparsely populated southwest corner of South Dakota. The project, named "Lonetree," had the financial and operational

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[2] For simplicity, the Petitioner, the State of South Dakota, will be referred to as the "State," and the Respondent, SDDS, Inc., as "SDDS."

backing of the Burlington Northern Railroad and Browning Ferris Industries, then the second largest waste disposal company in the United States. Eventually, however, a blatantly protectionist movement to "keep [Lonetree's] imported garbage out of South Dakota," *see SDDS, Inc. v. State of South Dakota*, 47 F.3d 263, 266 (8th Cir. 1995) ("*SDDS VI*"),[3] resulted in a statewide referendum that killed the project. "[T]he practical effect of the referendum was to prohibit the construction of the Lonetree facility." *In re SDDS, Inc.*, 97 F.3d 1030, 1039 (8th Cir. 1996).

SDDS responded by bringing a § 1983 suit against the State and named state officials in the United States District Court for the District of South Dakota seeking to

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[3] It has been the custom of the court of appeals and the parties to refer to the numerous federal and state decisions relating to Lonetree by sequentially roman-numbered short names beginning with "*SDDS I*," and so on. The practice was continued in the State's Petition and will be used here as well. For the information of the Court, the following is a partial list of some of the "SDDS" series, including cases which will be cited in this brief: *In the Matter of SDDS, Inc.*, 472 N.W.2d 502 (S.D. 1991); *SDDS, Inc. v. State of South Dakota*, 481 N.W.2D 270 (S.D. 1992) ("*SDDS II*"); *SDDS, Inc. v. State of South Dakota*, 994 F.2d 486 (8th Cir. 1993) ("*SDDS III*"); *SDDS, Inc. v. State of South Dakota*, 502 N.W.2d 852 (S.D. 1993); *In the Matter of the 1990 Renewal Application of SDDS, Inc.* 507 N.W.2d 702 (S.D. 1993) ("*SDDS IV*"); *SDDS, Inc. v. State of South Dakota*, 843 F.Supp. 546 (D.S.D. 1994) ("*SDDS V*"); *SDDS, Inc. v. State of South Dakota*, 47 F.3d 263 (8th Cir. 1995) ("*SDDS VI*"); *In re SDDS, Inc.*, 97 F.3d 1030 (8th Cir. 1996) ("*SDDS VIII*"); *SDDS, Inc. v. State of South Dakota*, 569 N.W.2d 289 (S.D. 1997) ("*SDDS IX*"); *State of South Dakota v. SDDS, Inc.*, 523 U.S. 1118 (1998) ("*SDDS X*"); *SDDS, Inc. v. State of South Dakota*, 225 F.3d 970 (8th Cir. 2000) ("*SDDS XII*").

declare the referendum unconstitutional and enjoin its enforcement. The complaint alleged that the referendum violated SDDS's rights to due process and equal protection of law and unconstitutionally interfered with interstate commerce. That such an action was entertained against the State itself was hardly the "extraordinary departure" from Eleventh Amendment principles that the State now wants this Court to believe. What the State omits to mention is that the action was maintained against the State itself because at all times pertinent, the State itself expressly *consented* to this being so. Thus, in November of 1991, when the State filed its answer to SDDS's suit in the district court, the State expressly admitted that the court "has jurisdiction over the claims" set forth in the complaint.[4] Consistent with this express consent to jurisdiction over the claims for declaratory and prospective injunctive relief, the answer of the State went on to assert the Eleventh Amendment as an affirmative defense only " . . . to the extent [the complaint] can be construed to involve a claim for monetary relief . . . "[5]

Consistent with this deliberate and carefully expressed consent to jurisdiction, the State itself, in its own name, proceeded to wage a determined five-year battle to attempt to uphold the unconstitutional referendum that had stopped Lonetree and driven SDDS out of business. The State twice obtained summary judgments in the district court dismissing SDDS's complaint

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[4] State's answer to the complaint, ¶ 6, dated November 26, 1991, *SDDS, Inc. v. State of South Dakota*, No. 91-5121, United States District Court for the District of South Dakota.

[5] *Id.*, ¶ 24.

and then appeared, in its own name, in the court of appeals in unsuccessful attempts to uphold the district court's decisions favorable to it, all the while never even suggesting that the Eleventh Amendment was a bar to the civil rights action it was defending in the name of the State. The State did not dispute the Eighth Circuit's jurisdiction over the State in *SDDS III* when it reversed the district court's summary judgment dismissing the complaint on procedural grounds and remanded the case for "a full explication of SDDS's federal constitutional claims." *SDDS III*, 994 F.2d at 494. Nor did the State suggest it had any Eleventh Amendment protection after the court of appeals in *SDDS VI* reversed a second summary judgment in the State's favor and held that the referendum was unconstitutional. *SDDS VI*, 47 F.3d at 263. Nor did the State object on Eleventh Amendment grounds when it was ordered to pay SDDS's attorneys' fees, pursuant to 42 U.S.C. § 1988.

This calculated litigation strategy was consistent with the apparent practice of the State, whose Attorney General has broad authority under S.D. Codified Laws § 1-11-1(2) (Michie 2000) to defend "in any court" actions "in which the state may be a party or interested," to waive sovereign immunity in federal court declaratory judgment actions where important interests of the State or its citizens are at stake. *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), where, as here, the State filed an answer electing to waive Eleventh Amendment immunity so it could defend the interests of the state.[6] Such actions by the State, where it

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[6] State's Answer, ¶ V, *Yankton Sioux Tribe v. Southern Missouri Waste Management District v. State of South Dakota,*

has made free use of the federal courts whenever doing so suits its purposes, casts serious doubt on its present attempt to pose the "questions presented" for review as if, it is conveniently assumed, "state law barred state officials from waiving Eleventh Amendment immunity from suit in federal court." *Petition*, p.(I) (Questions Presented). If this is indeed the rule in South Dakota, it appears to be one honored more in the breach than the observance.

It appears that the State's purpose in consenting to jurisdiction in the present case was to attempt to uphold the "sacred constitutional rights of the citizens of South Dakota" to exercise the power of referendum.[7] Even after the State lost that crusade, and the referendum was struck down as unconstitutional in *SDDS VI*, the Eleventh Amendment was not raised by the State, and it accepted the judgment and paid the substantial award of attorneys' fees that was entered against it. The reason that there was not an Eleventh Amendment defense raised at any time while this initial five-year legal battle was being fought, SDDS suggests, was because the State knew full well that it had waived that defense years before at the outset of the case. If the State had truly believed then, as it professes to believe now, six years later, that the two

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United States District Court, District of South Dakota, No. 94-4217, filed Nov. 7, 1994.

[7] State's Petition for Rehearing and Suggestion for Rehearing En Banc, p. 8, dated April 23, 1993; *SDDS, Inc. v. State of South Dakota*, 8th Circuit Court of Appeals, Case No. 92-1898. *Compare, In re Baldwin-United Corporation*, 770 F.2d 328, 341 (2nd Cir. 1985) (State's immunity not implicated when it appears to vindicate the individual rights of its citizens).

judgments entered against it by the court of appeals were void, it surely would have challenged them, at the very latest, before the judgment in *SDDS VI* became final, by petitioning for rehearing and, if necessary, seeking review by this Court. The State did neither. Its failure to do so unmistakably confirms its original consent to jurisdiction and belies its present position.

It was not until the subsequent 1996 ancillary proceeding in *SDDS VIII*, which was brought to effectuate the judgment in *SDDS VI*,[8] that the State, for the first time, belatedly raised an Eleventh Amendment defense. Even then, however, the defense which it asserted was a limited one. The State did not at that time go so far as to contend, as it now does, that simply because it is a state, the federal courts lacked original jurisdiction under the Eleventh Amendment. Instead, and still fully consistent

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[8] The State boldly asserts that there was no continuing violation of federal law to be concerned about at that time. *Petition*, p. 4. But in rejecting the same argument then, the Eighth Circuit pointed out that, "almost from the moment the decision [in *SDDS VI*] was filed," the State had attempted to thwart it by, *inter alia*, proclaiming that SDDS "has, in essence, obtained a judgment that can do it no good. . . . [and] has in fact accomplished nothing more than obtaining 'the moral satisfaction of knowing that a federal court concluded [its] rights had been violated. . . . ' " *SDDS VIII*, 97 F.3d at 1036 n. 6. The State was also asserting that the Eighth Circuit's decision was not "binding precedent" in the state courts. *Id.* Rejecting this "unique interpretation of federalism," the Eighth Circuit observed that to permit such conduct to continue would "render[ ] our judgments largely nugatory and advisory," which would be "an intolerable result, and one which is not, we believe, mandated by the Eleventh Amendment." *SDDS VIII*, 97 F.3d 1035-36 and n. 6.

with its original partial waiver of the Eleventh Amendment, the State's argument in *SDDS VIII* was simply that the injunctive relief that was being sought went too far. The State contended that an injunction which would prohibit it from relitigating in state court two key issues that had already been litigated and determined against it in *SDDS VI*, could indirectly lead to establishing the State's liability in the state court takings case. The argument was that this went beyond the type of prospective injunctive relief which the State, at least tacitly, continued to concede would be proper in this case. *SDDS VIII*, 97 F.3d at 1036 n. 7. But when the Eighth Circuit rejected this limited Eleventh Amendment defense and directed the entry of an injunction to effectuate the prior judgment in *SDDS VI*, *see SDDS VIII*, 97 F.3d at 1035-36, 1041-42, the State again acquiesced in the judgment entered against it and paid a second award of attorneys' fees. Again, if the State had truly believed then, as it professes to believe now, five years later, that the succession of three judgments entered against it by the court of appeals were void, it surely would have challenged them, at the very latest, before the judgment in *SDDS VIII* became final, by petitioning for review by this Court. Its failure to do so for the third time unmistakably confirmed its original consent to jurisdiction and further belies its present position.

Even after the State then sought what it perhaps thought would be safe harbor in its own courts, it still did not attempt to assert the Eleventh Amendment as a defense to the validity of the federal judgments. Thus, when the South Dakota Supreme Court held in *SDDS IX*, 569 N.W.2d 289, that the unconstitutional referendum had effected a taking of SDDS's property and on that basis

reversed the state trial court's summary judgment dismissing SDDS's state court takings suit and remanded the case with instructions to hold a jury trial to determine damages, the State still did not suggest that the federal judgments, which the South Dakota Supreme Court had considered itself obliged to honor, were void.

The State's present effort to make it appear that it "declined to file a supplemental brief requested by the South Dakota Supreme Court or to present any oral argument regarding the impact of the federal injunction upon the state takings action," because it was threatened by SDDS with contempt if it did so, *Petition* at 4, is not an accurate rendition of what actually occurred. The facts are that on December 23, 1996, the South Dakota Supreme Court ordered the parties in that case to file supplemental briefs "addressing the impact" of the Eighth Circuit's decision on the issues on appeal. Instead of responding as directed, the State, on February 26, 1997, unilaterally advised the state supreme court that it considered itself "constrain[ed]" by the federal mandate and therefore "must respectfully decline from filing additional briefing regarding this matter."[9] This, of course, was not so, because while the State had been enjoined from relitigating two specific issues, it was certainly free to advise the state supreme court of anything else that might be pertinent, including any argument that the State might then have had that the judgments of the Eighth Circuit were void on Eleventh Amendment grounds.

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[9] *Appellees' Supplemental Statement*, p. 2, dated February 26, 1997, S.D. Supreme Court, No. 19555.

But for the State to assert now that it said nothing then because it was threatened with contempt, is not true. It was not until much later, after the State had already announced its intention not to submit a brief, that SDDS did suggest that the State should withdraw its original brief in the state supreme court because that brief contained virtually nothing except arguments on the two issues which the Eighth Circuit had directed that the State not relitigate. That the State thus elected to stand mute before the South Dakota Supreme Court only once again underscores its understanding, at least at that time, that it had effectively consented to federal jurisdiction over it.

Although the State did petition the South Dakota Supreme Court for rehearing in that case, it did not, even then, suggest that the judgments entered in the federal litigation, which the state court had accepted as controlling, were void because of the Eleventh Amendment. It was not until the State hired new lawyers and then proceeded to petition this Court, in No. 97-1378, for a writ of certiorari to review the South Dakota Supreme Court's 1997 decision, that the State, for the first time, advanced the contention that the Eighth Circuit had lacked original jurisdiction to enter the judgments in *SDDS VI* and *SDDS VIII*. This Court denied the State's petition for a writ of certiorari in *SDDS X*, 523 U.S. 1118 (1998). Despite the State's present efforts to make it appear that its current petition for a writ of certiorari stands on different footing than the first, a comparison of the two petitions will show that substantially the same Eleventh Amendment arguments that are now being advanced, alleging that the Eighth Circuit lacked jurisdiction to enter the judgments

in question, were also asserted as the basis for granting certiorari in the prior petition in No. 97-1378.

2. The Decision of the Court of Appeals.

It was against this protracted history of the State's consent to suit in the federal courts for the avowed purpose of attempting to uphold the constitutionality of the referendum that the Eighth Circuit entered its most recent decision which the State is now petitioning this Court to review. The State refers to this as a "brief" decision, apparently intending to suggest that brevity somehow connotes lack of substance. But nothing could be further from the truth. The language of this latest decision of the court of appeals may indeed be somewhat terse, but it has to be read in the context of the three lengthy opinions that preceded it. When this is done, the mischaracterizations of the court's holdings which appear in the State's petition become obvious.

For example, contrary to the State's assertion that the court of appeals held that the state had "surrendered its Eleventh Amendment immunity simply by litigating the merits of the claims against it . . . ," *Petition* at 2, it is clear that the court was in fact looking at much more. What the Eighth Circuit was no doubt referring to when it observed that "[a] state may . . . waive its Eleventh Amendment immunity through its conduct. . . . [and][c]ourts have inferred a waiver when the State has made a general appearance in federal court and defended a lawsuit on

the merits. . . . [citation omitted],"[10] *State's App.*, p. 4a, was the *totality* of the State's conduct in the present case, which, as seen above, began with an express waiver and was followed by acquiescence in three adverse final judgments as to which no further review was sought. Thus, after quoting from this Court's opinion in *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 389 (1998), "that the Eleventh Amendment . . . does not automatically destroy original jurisdiction. . . . [but] [r]ather grants the State a legal power to assert a sovereign immunity defense should it choose to do so," the Eighth Circuit concluded:

> In the present case, the State for many years actively and vigorously litigated the merits of SDDS's claims in federal court, never once raising an Eleventh Amendment immunity defense until after the mandates had been issued and our decisions in *SDDS VI* and *SDDS VIII* were final. In light of the State's conduct, it would appear that the State has waived any sovereign immunity defense it may have had to the claims addressed in *SDDS VI* and *SDDS VIII*.

State's App., p. 4a.

The Eighth Circuit's treatment of the waiver issue on the facts before it was actually the secondary, or alternative, basis for its decision. Initially, the court of appeals held that the State could not use Fed.R.Civ.P. 60(b)(4) to attack the final

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[10] The case cited in the Eighth Circuit's opinion, *Hankins v. Finnel*, 964 F.2d 853 (8th Cir. 1992), *cert. denied*, 506 U.S. 1013 (1992), also involved more than a state just appearing and litigating. In that case, as here, the state had not only defended a suit, but had,"[i]n sum, . . . acted . . . of and for the benefit of itself." *Id.*, 964 F.2d at 858.

unappealed judgments in *SDDS VI* and *SDDS VIII*, and that those judgments were not void because the Eleventh Amendment "does not automatically destroy original jurisdiction." [quoting *Schacht*, 524 U.S. at 389] *State App.* at 4a. Since this Court could affirm the court of appeals on this narrow ground alone, and therefore choose not to reach the constitutional question posed by the court of appeal's alternative Eleventh Amendment waiver holding, the propriety of the Rule 60(b)(4) holding will be addressed first in the discussion that follows.

REASONS FOR DENYING THE WRIT

This case does not meet any of this Court's announced criteria for granting review of a decision of a court of appeals. The purported conflicts which the State portrays between the present decision of the Eighth Circuit and decisions of other circuits, and with controlling decisions of this Court, are an illusion at best. The cases upon which the State relies to posit the existence of such a conflict, which are exemplified by the Sixth Circuit's 1974 decision in *Jordan v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), have either been impliedly overruled or have lost all weight as authority by reason of intervening decisions of this Court, as well as by later decisions by the same courts which entered them, and are not an adequate basis for seeking certiorari. These illusory conflicts will be more fully discussed in the following sections of this response.

The State's further effort to make it appear that, if the Eighth Circuit's decision is allowed to stand, it will "undermine fundamental Eleventh Amendment doctrine, detract from 'the dignity and respect afforded a State, which the [Eleventh Amendment] immunity is designed to protect' [quoting *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997)], and create uncertainty in areas of great practical importance," *Petition* at 7, is unsupportable. Rather than detracting from fundamental Eleventh Amendment doctrine, the decision of the Eighth Circuit echoes it. The State's position to the contrary, which underlies *all* of its arguments here, is that the several final judgments which were entered against it in the Eighth Circuit can now be collaterally attacked because, the State supposes, they are void for want of subject matter jurisdiction. In this regard, however, it is the State itself which seeks to roll back more than two centuries of Eleventh Amendment jurisprudence, dating back at least to *Clark v. Barnard*, 108 U.S. 436, 447 (1883), and which was recently reaffirmed by this Court in the *Coeur d'Alene Tribe* and *Schacht* cases, whose consistent teaching has been that the Eleventh Amendment does not automatically deprive a federal court of original jurisdiction and, unlike subject matter jurisdiction, is an assertable defense, or privilege, a state can waive if it chooses.

The State's contention that allowing the decision to stand will detract from "the dignity and respect" afforded a state is, under the facts of this case, at odds with the Bill of Rights.

> [T]he use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of,

> and one which does not affect, the State in its sovereign or governmental capacity.

Ex Parte Young, 209 U.S. 123, 159 (1908).

To hold otherwise would in this case only denigrate the "dignity and respect afforded a State," which *Coeur d'Alene* references, by allowing a state to play games with the Eleventh Amendment and use it to manipulate federal courts and litigants by, first, consenting to suit, then litigating to achieve a desired result, and finally, after the litigation is done and the judgments are final, withdrawing its consent, or not, depending on its satisfaction with the outcome. This is not the sort of gamesmanship the Constitution envisions. *See Schacht*, 524 U.S. at 394 (Kennedy, J., concurring) (expressing concern about the "impropriety" of allowing a "belated assertion of the Eleventh Amendment bar . . . [that] would allow states to proceed to judgment without facing any real risk of adverse consequences").

Finally, this Court should not allow itself to be misled by the State about what is actually at issue in the present case. The State's transparent design here, which is plainly evidenced in its retroactive attempt to nullify the jurisdiction of the Eighth Circuit, is to close the doors of its own courthouses to SDDS's efforts to obtain just compensation under the Takings Clause for the State's unconstitutional confiscation of its rights to develop the Lonetree interstate waste disposal facility.[11] But the Fifth Amendment's Takings Clause is not a "poor relation" of other parts of the

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[11] In connection with the cross-appeals by SDDS and the State which are currently pending in the South Dakota Supreme Court in No. 21428, which grow out of the state trial court's

Constitution. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). This Court should not sanction such a misuse of the Eleventh Amendment to nullify the Bill of Rights. The State had ample opportunities in this protracted litigation to assert an Eleventh Amendment immunity and should not now be allowed to escape whatever consequences may flow under the Constitution from its own repeated choices not to do so.

I. THE DECISIONS OF THE EIGHTH CIRCUIT ARE NOT SUBJECT TO ATTACK UNDER FED.R.CIV.P. (60)(b)(4)

The basic assumption that underlies all of the arguments contained in the State's petition is that the decisions in *SDDS VI* and *SDDS VIII* are "void" for want of subject matter jurisdiction, and that they can therefore be successfully attacked under Rule 60(b)(4). But this is simply wrong. This Court has repeatedly rejected the view that the Eleventh Amendment operates to deprive a federal court of subject matter jurisdiction to determine a case or controversy otherwise properly before it.

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nullification of the jury verdict in SDDS's favor on its Fifth Amendment takings claim, the State is openly urging the South Dakota Supreme Court to disregard *SDDS VI* and *SDDS VIII* as being void. Further, the State is urging the South Dakota Supreme Court to hold that SDDS's Fifth Amendment remedy for the damages inflicted upon it by the unconstitutional referendum is not under the self-executing provisions of the Takings Clause, but is instead governed solely by the Due Process Clause (as to which the State of course claims it cannot be sued, even in its own courts, because it is not a "person" within the meaning of 42 U.S.C. § 1983).

> Rather, a State can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it. The Amendment, in other words, enacts a sovereign immunity from suit, rather than a nonwaiveable limit on the federal judiciary's subject-matter jurisdiction.

Coeur d'Alene Tribe, 521 U.S. at 267.

The Court's unanimous decision a year later in *Schacht* made it even more plain that the Eleventh Amendment does not automatically deprive a federal court of subject matter jurisdiction, such as would render a judgment against a state *void* within the meaning of Rule 60(b)(4).

> The Eleventh Amendment, however, does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. [citations omitted]. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it. [citation omitted].

Schacht, 524 U.S. at 389.

The unavailability of relief under Rule 60(b)(4) is further foreclosed in the present case as a result of the State's considered choice not to appeal the decisions it now seeks retrospectively to attack, especially the 1996 decision in *SDDS VIII* which rejected the limited Eleventh Amendment defense that the State chose to advance at that time. "Petitioner made a considered choice not to appeal . . . There must be an end to litigation someday,

and free, calculated, deliberate choices are not to be relieved from." *Ackerman v. United States*, 340 U.S. 193, 198 (1950). *See also Federated Dep't Stores v. Moitie*, 452 U.S. 394 (1981).

The State attempts to escape the consequences of its failure to seek timely certiorari review of the decisions in *SDDS VI* and *SDDS VIII* by suggesting that requiring a petition for certiorari in such a situation, rather than allowing later resort to Rule 60(b)(4) to obtain relief, is "insupportable" and "inconsistent with the holdings of other courts of appeal." *Petition* at 8. What the State overlooks, however, is that the Eighth Circuit's determination of its jurisdiction to act in *SDDS VIII*, which rejected the State's Eleventh Amendment challenge, is now conclusive.

> But that was a question which the circuit court of the United States was competent to determine in the first instance. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them, or either of them, collaterally, or otherwise than on writ of error or appeal to this court.

Stoll v. Gottlieb, 305 U.S. 165, 175 (1938).

"The court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action." *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377 (1940). "It has long been the rule that principles of res judicata apply to jurisdictional determinations – both subject matter and personal." *Insurance Corp. of Ireland v. Compagnie des Bauxites de*

Guinee, 456 U.S. 694, 702 n. 9 (1982). "It is just as important that there should be a place to end as that there should be a place to begin litigation." *Stoll*, 305 U.S. at 172. Rather than being "unsupportable," therefore, the Eighth Circuit's holding that the State is now conclusively bound by the unappealed decisions in *SDDS VI* and *SDDS VIII* is fully in accord with the established law.

The State's contention that the Eighth Circuit's decision in this case is inconsistent with decisions of other courts of appeal *is* unsupportable. The "conflicts" which the State is attempting to portray are illusory. Of the three cases cited by the State in support of that proposition, only *Jordan v. Gilligan*, 500 F.2d 701 (6th Cir. 1974) implicated Eleventh Amendment immunity. *Jordan* itself is no longer good law and has not been since *Hutto v. Finney*, 437 U.S. 678 (1978) and *Missouri v. Jenkins*, 491 U.S. 274 (1989) established, contrary to the ultimate holding in *Jordan*, that ancillary relief in the form of an award of attorneys' fees against a state under 42 U.S.C. § 1988 does not violate the Eleventh Amendment. Moreover, what was left of *Jordan*, which consisted of the notion that the Eleventh Amendment trumps subject matter jurisdiction, was once and for all rejected by this Court in *Schacht*. Significantly, in *Kovacevich v. Kent State University*, 224 F.3d 806 (6th Cir. 2000), the Sixth Circuit acknowledged that this Court's decision in *Schacht* had overruled its earlier holdings that the Eleventh Amendment was an absolute bar to the federal court's exercise of jurisdiction over a state. *Jordan* has thus been impliedly overruled and is no longer valid precedent, even in the circuit that decided it.

Contrary to the unfocused picture the State attempts to project, the circuits have been uniformly firm in adhering to the principle that Rule 60(b) cannot be used as a substitute for direct review of a judgment, and that subsection (4) only applies in instances involving " . . . a plain usurpation of power, when a court wrongfully extends its jurisdiction beyond the scope of its authority." *Kansas City Southern Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir. 1980). *See, to the same effect, United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000) ("To be egregious, and thus void under Rule 60(b)(4), the error must involve a clear usurpation of judicial power, where the court wrongfully extends its jurisdiction beyond the scope of its authority.") *Gschwind v. Cessna Aircraft Company*, 232 F.3d 1342 (10th Cir. 2000) (there must be no arguable basis on which the court could have rested a finding that it had jurisdiction); *Nemaizer v. Baker*, 793 F.2d 58, 65 (2nd Cir. 1986) (Rule 60(b)(4) applies only where there is "a clear usurpation of power by a district court, and not an error of law in determining whether it has jurisdiction."); and *United States v. One Rural Lot No. 10,356*, 238 F.3d 76, 78 (1st Cir. 2001) (A judgment is not void simply because it is or may have been erroneous. It is void only if from its inception, it was a legal nullity).

In the final analysis, since as *Schacht* and other pertinent decisions of this Court have by now made plain the Eleventh Amendment does not automatically deprive the federal courts of original jurisdiction over a state, it follows that the Eighth Circuit's exercise of jurisdiction over the State in the two decisions now being attacked was not the egregious usurpation of power required to render a judgment void within the meaning of Rule 60(b)(4).

II. THE STATE HAS IN ANY EVENT EFFECTIVELY WAIVED ITS IMMUNITY IN THE PRESENT CASE

The Eleventh Amendment was not designed to protect a state which, as the State did in the present case, voluntarily appears and participates on the merits of a case in federal court. The bar of the Eleventh Amendment is not absolute and, like any other privilege, may be waived. *Clark v. Barnard,* 108 U.S. 436, 448 (1883) (the State "made itself a party" by voluntarily appearing and pursuing a position in its own interest). "None of the prohibitions . . . of the [Eleventh] amendment . . . relate to the power of a Federal court to administer relief in causes where jurisdiction, . . . has been acquired as a result of voluntary action of the state in submitting its rights to judicial determination." *Gunter v. Atlantic Coast Line RR Co,* 200 U.S. 273, 292 (1906). *See also, Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275, 276 (1959) (The Eleventh Amendment is "an immunity which a State may waive at its pleasure . . . "). In short, "the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense." *Schacht,* 524 U.S. at 389. The facts discussed at the beginning of this response clearly establish such a waiver by the State in the present case.

The State argues that its mere voluntary participation in the case was not enough to effect a waiver, however, and at pages 9-10 of the petition it points to the line of cases in which this Court has accorded the states great latitude in raising the defense "at any point *of the proceedings." Florida Dep't of State v. Treasure Salvors,* 458 U.S. 670,

683, n. 18 (1982) (emphasis added). In *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 467 (1945), it was held that raising the defense for the first time in this Court, in proceedings on certiorari, was "in time." This long leash has its limit, however, and in no case of which we are aware has this Court allowed it to stretch beyond the conclusion of the "proceedings" in question. To allow it to do so in the present case would not only do violence to the doctrine of finality, discussed *supra*, upon which so much of our legal system depends, but would grant the State a license to treat final judgments of a federal court as merely advisory and subject to revision at any time at the whim of the State. *See Vecchione v. Wohlgemuth*, 558 F.2d 150, 158-59 (3rd Cir. 1977), *cert. denied*, 434 U.S. 943 (1977) (holding that while Eleventh Amendment immunity could have been asserted for the first time on appeal, where no appeal is taken a participating state's waiver "must be deemed to have become final at the latest when the resulting judgment has become final").

The State's final attempt to escape the consequences of its consensual participation in the protracted litigation in federal court, and its deliberate choice not to seek review of any of the final judgments that were entered against it, involves its assertion that a South Dakota statute, S.D. Codified Laws § 3-21-10, prohibited its attorneys from waiving Eleventh Amendment immunity. Laying aside for now the somewhat ambiguous language of § 3-21-10 and the problem of reconciling it with another South Dakota statute, S.D. Codified Laws § 1-11-1(2), which makes it one of the "duties" of the State's attorney general "to appear for the state and . . . defend, in any court . . . , any cause . . . in which the state may be a party

or interested," and also laying aside at this time the previously discussed practice of South Dakota's attorney general to ignore S.D. Codified Laws § 3-21-10 when it is deemed expedient to do so, the fact remains that this statutory defense yields to federal law.

Such statutes, whether of South Dakota or other states, which are either designed to or have the practical effect of insulating a state or its officials from civil rights suits are preempted by 42 U.S.C. § 1983. *See, Felder v. Casey*, 487 U.S. 131, 139 (1988) (" . . . [A] state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted . . . "). Just as in *Felder* where the Wisconsin notice-of-claim requirements of Wisconsin's statute failed to insulate Wisconsin from liability in its own courts for claims brought under the preemptive provisions of § 1983, so have courts in the Eighth Circuit held the same § 1983 preemption applies to state attempts to curtail federal court jurisdiction and to similar state statutes claiming to render its officials immune from § 1983 claims. Indeed, the identical South Dakota statute under which the State claims it is immune here was held to have been preempted in *Webb v. Lawrence County*, 950 F. Supp. 960, 967 (D.S.D. 1996), *aff'd*, 144 F.3d 1131 (8th Cir. 1998) ("This Court has held that [the immunity provided by S.D. Codified Laws § 3-21-10 is] preempted when the underlying claim is brought pursuant to 42 U.S.C. § 1983 for an intentional violation of personal civil rights.").[12] The Eighth Circuit has itself recognized § 1983's preemptive effect on conflicting state laws in *Hankins*. ("We thus

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[12] SDDS's cause against the State, for vindication of SDDS's civil rights to engage in interstate commerce, is unquestionably a § 1983 suit. *Dennis v. Higgins*, 498 U.S. 439 (1991).

conclude that § 1983 preempts the Missouri [statute] as it is applied in this case.") *Id.*, 964 F.2d at 861.[13]

This accords with decisions of this Court. *See Howlett v. Rose*, 496 U.S. 356, 376-377 (1990), quoting from *Martinez v. California*, 444 U.S. 277, 284 n. 8 (1980).

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.

Just as it omitted to raise Eleventh Amendment immunity until after *SDDS VI* and *SDDS VIII* were each final and unappealed, the State similarly never raised the claimed bar of S.D. Codified Laws § 3-21-10 in those

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[13] The State argued before the Eighth Circuit that other Eighth Circuit cases vindicating application of such statutes, specifically *Fromm v. Comm'n*, 220 F.3d 887 (8th Cir. 2000), *petition for cert.* filed Feb. 27, 2001, and *Santee Sioux Tribe of Nebraska v. Nebraska*, 121 F.3d 427 (8th Cir. 1997), irreconcilably conflicted with *Webb* and *Hankins*. However, neither *Fromm* nor *Santee Sioux* was brought under § 1983. Nor were the cases of this Court on which the State relies in its present Petition, *Ford Motor Co. v. Dep't of the Treasury*, 323 U.S. 459 (1945), and *Sosna v. Iowa*, 419 U.S. 393 (1975), cases brought under § 1983. A contrary ruling would perversely insulate state actors, courtesy of state statutory interdiction, from liability for the federal civil rights violations § 1983 was specifically designed by Congress to address in 1871.

cases. The State should accordingly not be heard to complain, as it may, that it is not a "person" within the meaning of § 1983, for it has as surely waived the right to make that contention as it is precluded at this late date from asserting an Eleventh Amendment immunity. With words directly applicable here, the Third Circuit, in *Mitchell v. Comm'n*, 12 F.3d 406 (3rd Cir. 1993), after rejecting a claim by a state agency that it was immune under the Eleventh Amendment from federal court jurisdiction and that it was not a "person" for purposes of § 1983, put that argument to rest:

> The Commission's alternative defense that it is not a "person" as that term is used in 42 U.S.C. Sec. 1983 can fare no better, of course, than its eleventh amendment one. The eleventh amendment is quasi-jurisdictional; the alternative statutory defense is non-jurisdictional and should have been raised in a motion under Fed.R.Civ.P. 12(b)(6). It is well settled that a defense of failure to state a claim cannot be asserted following a failure to appeal a final judgment. [Citations omitted].

Id., at 12 F.3d 409.

Finally, SDDS suggests that the present petition is not the proper vehicle in which to accept Justice Kennedy's implied invitation in his concurring opinion in *Schact* that it may have to lie with "some later case," *id.*, 524 U.S. at 394, to test whether a state's mere appearance in, and litigation of, a federal court action otherwise subject to a claim of Eleventh Amendment immunity constitutes, as with *in personam* jurisdiction, a waiver of the right to claim such immunity at a later point in the litigation process. While the circuit court decision here may partake

of these considerations, it does so only in passing, because lying at the heart of the dispute here is instead whether three final decisions of the Eighth Circuit entered literally years ago are void for lack of subject matter jurisdiction so as to be subject to attack under Rule 60(b)(4), Fed. R. Civ. P. Given the clear holdings of this Court in *Coeur d'Alene* and *Schact* that Eleventh Amendment immunity is not equivalent to an absence of subject matter jurisdiction, SDDS submits that on this record the affirmance of these three unappealed final decisions is compelled by this Court's holdings in *Coeur d'Alene* and *Schact*.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

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Supreme Court, U.S.
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No. 00-1273

In the Supreme Court of the United States

STATE OF SOUTH DAKOTA,

Petitioner,

v.

SDDS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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Respondent SDDS's brief in opposition confirms that the decision below departs from fundamental principles of state sovereignty. SDDS's basic argument against review is its assertion that States *may* be deemed to waive Eleventh Amendment immunity by participating in litigation, and that, in any event, federal-court judgments overriding that immunity should not be treated as void. As we explained in the petition, however, these arguments are inconsistent with decisions both of this Court and of other courts of appeals. Because the Eighth Circuit's holding creates considerable confusion in areas of great practical importance, further review is essential.

A. SDDS's Account Of The Proceedings Below Should Not Obscure The Eighth Circuit's Holding That A State Waives Its Eleventh Amendment Immunity By Engaging In Litigation

SDDS's account of the procedural background of this case attempts to create the impression that the State was inexcusably manipulative or dilatory in raising its Eleventh Amendment arguments. Although these contentions have no direct bearing on the legal issues presented here, it is worth noting that they are misleading in several significant respects.

First, SDDS is wrong in contending that the State, in a calculated attempt to "ma[k]e free use of the federal courts whenever doing so suits its purposes" (Br. in Opp. 5), expressly consented to (or acquiesced in) the exercise of federal jurisdiction over the claims at issue here. See Br. In Opp. 3-7. The State and its officers did not voluntarily invoke federal jurisdiction; they simply responded to the Commerce Clause claims advanced against them in *SDDS VI*. See Pet. 3; compare, *e.g.*, *Wisconsin Dept. of Corrections* v. *Schacht*, 524 U.S. 381, 395 (1998) (Kennedy, J., concurring). To be sure, in doing so the State's attorneys failed expressly to contest the assertion of federal jurisdiction over the State itself. But that oversight is, perhaps, understandable: because the federal court unquestionably had *Ex Parte Young* jurisdiction to resolve claims that the 1991 ballot referendum was unconstitutional – claims that were advanced against South Dakota officers sued

in their official capacities – the fact that the complaint also named the State was of limited practical importance.

In contrast, the State and its officials have vigorously contested the exercise of federal jurisdiction over claims that could effectively require South Dakota to pay money damages – that is, the claims that were advanced in *SDDS VIII* and that are principally at issue in this petition. As SDDS itself acknowledges (at Br. in Opp. 3), the State's answer to the complaint expressly invoked the Eleventh Amendment "to the extent that [the complaint] can be construed to involve a claim for monetary relief." See Pet. 7 n.3. The State went on to argue this point at length to the Eighth Circuit in *SDDS VIII. In re SDDS, Inc.*, No. 96-2705 (CA8), Resp. Br. 12-13. As a consequence, SDDS plainly is wrong in suggesting that this is a case in which the State tried to "manipulate federal courts and litigants by, first, consenting to suit, then litigating to achieve a desired result, and finally, after the litigation is done and the judgments are final, withdrawing its consent." Br. in Opp. 14.

Second, SDDS also is incorrect in arguing that this Court's denial of the State's petition for certiorari in *South Dakota* v. *SDDS, Inc.*, No. 97-1378, has any bearing on the current petition. The questions presented in No. 97-1378, which sought review of a decision of the South Dakota Supreme Court, concerned the *substantive* scope of the Eleventh Amendment and the res judicata effect of certain federal judgments on subsequent state-court proceedings; this case, in contrast, presents entirely different questions concerning *waiver* of Eleventh Amendment immunity and the scope of Rule 60(b)(4). In addition, SDDS's central grounds for opposing certiorari in No. 97-1378 were the arguments that the state-court decision was not yet final and that the federal questions in the case had not been addressed. No. 97-1378, Br. in Opp. 9-14. Neither of those arguments has any application here.

Third, SDDS misstates the basis of the Eleventh Amendment holding below. The Eighth Circuit did not, as

SDDS asserts, premise its decision on a finding of "an express waiver [that] was followed by acquiescence in three adverse final judgments." Br. in Opp. 11. Instead, the court of appeals declared that it was the State's "conduct" of litigation on the merits that effected the waiver of immunity. Pet. App. 4a-5a. Nor was it crucial to the court's finding of waiver in this latest proceeding that the Eighth Circuit's prior assertions of jurisdiction had become final; indeed, as we note in the petition (at 13 n.7), the authority cited by the Eighth Circuit as support for its waiver theory was a decision in which the State had asserted immunity during the course of the *initial* district court proceedings. The questions presented in the petition therefore come to this Court in stark terms: whether a State waives immunity by litigating the merits of the claim against it in federal court, and whether a party is barred from seeking review of a void judgment under Rule 60(b)(4) whenever the party did not first challenge that judgment by petitioning this Court for a writ of certiorari.

B. The Eighth Circuit's Erroneous Interpretation of Rule 60(b)(4) Is Inconsistent With Decisions Of Other Courts Of Appeals And Warrants Review

1. In defending the Eighth Circuit's construction of Rule 60(b)(4), SDDS argues principally that a judgment issued in violation of the Eleventh Amendment cannot be "void" within the meaning of the Rule because Eleventh Amendment immunity is waivable. Br. in Opp. 15-16. That reasoning, we note, was not the basis for the holding below, which turned on the Eighth Circuit's conclusion that Rule 60(b)(4) is inapplicable whenever the party seeking 60(b)(4) relief declined to first petition this Court for certiorari to overturn the challenged judgment. SDDS's new argument is, in any event, plainly inconsistent with this Court's precedents. As we noted in the petition (at 24), the Court settled long ago that, notwithstanding a sovereign's *ability* to waive its immunity, a judgment against the sovereign is void unless the sovereign actually *has waived* its immunity: "Consent alone gives

jurisdiction to adjudge against a sovereign. Absent that consent, *the attempted exercise of judicial power is void.*" *United States* v. *United States Fidelity & Guar. Co.*, 309 U.S. 506, 514 (1940) (emphasis added). As we also noted, the Court went on to hold in *United States Fidelity & Guaranty* that a sovereign may not be bound by such a void judgment. See *id.* at 514-515. SDDS makes no response to this point.

Indeed, even where collateral attacks on judgments are involved (and as we explain below, the attack on the judgment in this case is direct rather than collateral), the judgment is "void if it * * * was issued in contravention of a * * * sovereign immunity. * * * [Such judgments] remain subject to collateral attack if recognition or enforcement is sought either in the jurisdiction where reached or in another jurisdiction." 18 MOORE'S FEDERAL PRACTICE § 130.04[3], at 130-15, 130-16 (Matthew Bender ed. 2000). For this reason, the usual res judicata and collateral estoppel rule – which bars collateral attack on a court's determination of its own jurisdiction – "is not applicable in actions against a sovereign where the officials who represent the sovereign in the action *are not empowered to waive the immunity of the sovereign or to bind the sovereign by litigating the question of its immunity.*" RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 96, cmt. a (1971) (emphasis added) (citing *United States Fidelity & Guaranty).* As a consequence, so long as the State did not waive its Eleventh Amendment immunity here, the challenged judgments are void within the meaning of Rule 60(b)(4).

2. The other arguments that SDDS asserts against review of the court of appeals' Rule 60(b)(4) holding are insubstantial. *First*, SDDS argues, as the Eighth Circuit held, that recourse to Rule 60(b)(4) is foreclosed by the State's failure to petition this Court for certiorari to review the challenged judgments. Br. in Opp. 16-17. As we explain in the petition (at 22-25), however, nothing in Rule 60(b)(4) makes pursuit even of a direct appeal from the void judgment – let alone the filing of *a petition for certiorari in this Court* – a prerequisite for relief under the

Rule. Indeed, imposition of such a requirement would run directly contrary to the rationale for the Rule, which is that a void judgment is a "nullity"; for this reason, although motions for relief from judgment brought pursuant to *other* sections of Rule 60(b) must be filed within a "reasonable" time, "[a] motion under Rule 60(b)(4) challenging a judgment as void is subject neither to the 'reasonable' time requirement * * * [nor] to the equitable doctrine of laches, but rather may be made at any time." 12 MOORE'S FEDERAL PRACTICE, § 60.44[5][a], at 60-150, 60-151. Again, SDDS makes no response to this point.[1]

Second, SDDS argues that the State was obligated to seek certiorari directly from the Eighth Circuit's decision in *SDDS VIII* – presumably, in SDDS's view, in lieu of *ever* seeking relief under Rule 60(b)(4) – because the court of appeals held in *SDDS VIII* that it had jurisdiction to decide the claim against South Dakota, and a court's express determination of its jurisdiction ordinarily is not subject to collateral attack. Br. in Opp. 17-18. But this argument is wrong on two scores. To begin with, as we explained in the petition (at 23-24), a challenge under Rule 60(b)(4) is "direct, not collateral," *Watts* v. *Pinckney*, 752 F.2d 406 (9th Cir. 1985), and the rule of jurisdictional finality invoked by SDDS simply has no application to direct attacks on judgments. SDDS makes no attempt to deal with this point. In addition, as we note above, *United States Fidelity & Guaranty* holds that an erroneous determination of jurisdiction may *not* bind a sovereign, even in proceedings that really *are* collateral. See also *Durfee* v. *Duke*, 375 U.S. 106, 114 (1963). There accordingly is nothing in the

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[1] The authorities cited by SDDS at Br. in Opp. 17 offer it no support. *Ackerman* v. *United States*, 340 U.S. 193 (1950), involved a request for relief from judgment pursuant to Rule 60(b)(6), not Rule 60(b)(4). The judgment in *Ackerman* thus was *not* void, making the decision irrelevant here. *Federated Dept. Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981), concerned rules of res judicata, rather than those governing direct attacks on judgments pursuant to Rule 60(b)(4), and also did not concern a judgment that was void.

Eighth Circuit's jurisdictional holding that bars recourse to Rule 60(b)(4).

Third, SDDS is wrong in contending that there is no conflict in the circuits on the proper construction of Rule 60(b)(4). In the petition (at 21-23), we cited decisions of the Fifth, Sixth, and Ninth Circuits holding that Rule 60(b)(4) relief *is* available even when the movant failed to first appeal the challenged judgment. Those courts expressly rejected the approach taken by the Eighth Circuit here. SDDS's only attempt to distinguish those decisions is its observation that two of them did not involve the Eleventh Amendment, and that the Eleventh Amendment analysis used by the third has been undermined by more recent doctrine. This argument, however, entirely misses the crucial point. For present purposes, the relevant holdings of the Fifth, Sixth, and Ninth Circuits are that parties *may* invoke Rule 60(b)(4) even when they did not appeal the challenged judgment; the relevant holding of the Eighth Circuit is that parties may *not* invoke Rule 60(b)(4) in such circumstances. None of these courts regarded the *reason* that the challenged judgment was void as having any bearing on the Rule 60(b)(4) analysis.[2] Review to resolve this conflict therefore is necessary.

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[2] SDDS is wrong in suggesting that the Sixth Circuit's decision in *Kovacevich* v. *Kent State University*, 224 F.3d 806 (6th Cir. 2000), somehow impliedly overrules the aspect of *Jordan* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974), that conflicts with the decision below. See Br. in Opp. 18. *Kovacevich* recognized that Eleventh Amendment immunity is waivable, but it went on to reaffirm that the immunity may be raised at any point in the proceedings – and it dismissed on immunity grounds a claim that had been raised for the first time on appeal. Other claims were allowed to proceed only because they were brought pursuant to a federal statute, enacted to enforce the Fourteenth Amendment, that abrogated Eleventh Amendment immunity. 224 F.3d at 816. Nothing in this holding retreats from *Jordan*'s conclusion an appeal is not a prerequisite to invocation of Rule 60(b)(4).

Fourth, SDDS also is wrong in contending that review is unwarranted because Rule 60(b)(4) relief is appropriate only when there has been "'a plain usurpation of [judicial] power'" and that, because "the Eleventh Amendment does not automatically deprive the federal courts of original jurisdiction over a state," the Eighth Circuit's decision "was not [an] egregious usurpation of power." Br. in Opp. 19 (citation omitted). This reasoning, again, was not the basis for the decision below. And the argument is wrong on its own terms. The fact that Eleventh Amendment immunity *may* be waived surely does not mean that a judgment is insulated from attack when a court commits plain error by exercising jurisdiction over a State that has *not* waived its immunity. That, of course, is precisely what happened here.

C. This Court Should Review The Eighth Circuit's Holding That A State Waives Eleventh Amendment Immunity By Participating In Litigation

SDDS's arguments against review of the Eighth Circuit's Eleventh Amendment holding are insubstantial. SDDS does not deny that, to the extent that its claims are attempting to obtain monetary relief from the State, the "waiver" of immunity found by the Eighth Circuit is one that is implied from the State's conduct of litigation. And SDDS makes no attempt to explain away the disagreement in the courts of appeals about the rules governing implied waivers of Eleventh Amendment immunity. Against this background, SDDS offers no reason for the Court to deny certiorari.

1. SDDS's principal argument against review is the assertion that the State did waive its immunity. But this contention assumes its conclusion. Like the Eighth Circuit, SDDS premises its argument on the proposition that a State surrenders its immunity when its attorneys "voluntarily appear[] and participate[] on the merits of a case in federal court." Br. in Opp. 20. As we explained in the petition, however, this Court consistently has rejected this argument,

holding that "[t]he fact that the State appeared and offered defenses on the merits does not foreclose consideration of the Eleventh Amendment issue." *Florida Dep't of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.18 (1982) (plurality opinion).[3]

To escape this precedent, SDDS contends that, although Eleventh Amendment immunity may be raised at any time prior to final judgment, South Dakota may not now claim immunity in this case because the State failed to invoke the Eleventh Amendment until after "the conclusion of the proceedings in question." Br. in Opp. 21. Once again, as we explain above (at 3) and also noted in the petition (at 13 n.7), that was not the basis for the Eighth Circuit's holding; the court of appeals believed that waiver could be found simply because "'the State has made a general appearance in federal court and defended a lawsuit on the merits.'" Pet. App. 4a (citation omitted). Indeed, the asserted "finality" of *SDDS VIII could not* have been crucial to the holding below because South Dakota *did* assert its immunity prior to judgment, both in its answer to SDDS's complaint and in its argument to the Eighth Circuit in *SDDS VIII*. It may be added, however, that South Dakota would be entitled to assert its immunity now even had it failed to do so prior to issuance of the Eighth Circuit's mandate in *SDDS VIII*; courts of appeals routinely have held that States may invoke the Eleventh Amendment to challenge the enforcement of unappealed judgments that had long since become final. See, *e.g.*, *Saahir* v. *Estelle*, 47 F.3d 758, 762 (5th Cir. 1995).

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[3] Not surprisingly, the authorities cited by SDDS at Br. in Opp. 20 are inapposite. In *Clark* v. *Barnard*, 108 U.S. 436, 447-448 (1883), and *Gunter* v. *Atlantic Coast Line R.R.*, 200 U.S. 273, 292 (1906), the State itself voluntarily *invoked* the jurisdiction of the federal court. And *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278-282 (1959), involved an interstate compact, entered into by the State, that this Court construed to waive immunity. There is nothing remotely similar in this case.

2. SDDS's argument that the Court should disregard the South Dakota statute that prohibits state officials from waiving Eleventh Amendment immunity has no merit at all. SDDS's contention that the statute is ambiguous (see Br. in Opp. 21) is patently wrong; the provision provides, without exception, that "[n]o waiver of state immunity by statute or, where permitted, by any officer or agent of the state may constitute or be interpreted as a waiver of the state's immunity from lawsuits *in federal court*." S.D. CODIFIED LAWS § 3-21-10 (Michie 2000) (emphasis added). As we noted in the petition (at 11-12), this statute, with its express disapproval of attempted waivers by state officers, has *greater* clarity than the provision at issue in *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 103 n.12 (1984) – which the Court read to declare "an express preservation of [the State's] immunity from suit in federal court." SDDS also is incorrect in arguing that § 3-21-10 is inconsistent with a South Dakota law that permits the State's attorney general to defend the State "in any court." Br. in Opp. 21 (citing S.D. CODIFIED LAWS § 1-11-1(2)). In fact, as this Court has long held, such a general statutory reference to "courts" may not be interpreted to waive a State's immunity against suit in *federal* court. See, *e.g*, *Port Authority Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299, 3060).

SDDS's remaining argument – that § 3-21-10 is preempted by 42 U.S.C. § 1983 (see Br. in Opp. 22-24) – is frivolous. It doubtless is true that States may not, by statute, immunize state officials against liability under § 1983, and the various decisions cited by SDDS stand for that proposition. See, *e.g.*, *Howlett* v. *Rose*, 496 U.S. 356, 376-377 (1990). That hardly means, however, that federal law preempts state statutes that decline to *waive* a State's constitutional immunity. If that were the case, Eleventh Amendment immunity would be rendered nugatory.

3. Finally, we note that the recent grant of certiorari in *Mathias* v. *WorldCom Technologies, Inc.*, No. 00-878, confirms that review in this case likewise is warranted. *Mathias* presents the question whether a state regulatory commission's

"acceptance of Congress' invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity"; the grant of certiorari suggests recognition of confusion in the courts of appeals about the scope of the Amendment. At the same time, it bears emphasis that it would *not* be appropriate for the Court to hold this case pending disposition of No. 00-878. The outcome in *Mathias*, which concerns the scope of *congressional* authority and the significance of state participation in a field that is regulated by Congress, will not control disposition of the Eleventh Amendment issue in this case – and will have no bearing at all on the Rule 60(b)(4) question. Holding the petition therefore would not obviate the need for ultimate review by this Court and would only delay final disposition of the case.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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